(9)

No. 91-712-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Humberto Alvarez-Machain

Docketed:
October 25, 1991

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hoffman,Paul L., Lutz,Ellen L., Westin,David, Hobson,Charles L., Mandler,John P., Wedgwood,Ruth

Entry	Date	Note	Proceedings and Orders
1	Oct 25 1991	G	Petition for writ of certiorari filed.
2	Nov 22 1991		Brief of respondent Humberto Alvarez-Machain in opposition filed.
3	Nov 26 1991		DISTRIBUTED. December 13, 1991
4	Nov 29 1991	X	Brief amicus curiae of United Mexican States filed.
5	Dec 6 1991	X	Reply brief of petitioner United States filed.
7	Jan 3 1992		REDISTRIBUTED. January 10, 1992
8	Jan 10 1992		Petition GRANTED. Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992.
			**********
15	Feb 5 1992		SET FOR ARGUMENT WEDNESDAY, APRIL 1, 1992. (1ST CASE).
9	Feb 12 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed.
10	Feb 13 1992		Joint appendix filed.
11	Feb 13 1992		Brief of petitioner United States filed.
12	Feb 18 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals, Ninth Circuit (also, District Court TR) (1 Box)
13	Feb 21 1992		CIRCULATED.
14	Feb 26 1992		Record filed.
		*	Original proceedings U. S. District Court for the Centeral District of California (10 Boxes)
18	Mar 3 1992	X	Brief amicus curiae of Minnesota Lawyers International Human Rights Committee filed.
19	Mar 4 1992	X	Brief amicus curiae of Americas Watch filed.
20	Mar 4 1992	X	Brief amicus curiae of Government of Canada filed.
21	Mar 4 1992	X	Brief amici curiae of Allard K. Lowenstein Internatl. Human Rights Clinic, et al. filed.
24	Mar 4 1992	X	Brief of respondent Humberto Alvarez-Machain filed.
16	Mar 5 1992	X	Brief amicus curiae of Lawyers Committee for Human Rights filed.
17	Mar 5 1992	X	Brief amicus curiae of Assn. of the Bar of City of New York filed.

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22	Mar 5 1992	X	Brief amicus curiae of United Mexican States filed.
23	Mar 5 1992	X	Brief amicus curiae of International Human Rights Law Group filed.
25	Mar 5 1992	X	Brief amicus curiae of Rene Martin Verdugo-Urquidez filed.
26	Mar 20 1992	X	Reply brief of petitioner United States filed.
27	Apr 1 1992		ARGUED.

91-712

No.

FILED
OCT 25 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a person whom the government brings to this country for criminal prosecution by means other than those provided for in an extradition treaty has a right not to be tried in this country's courts.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is not yet reported. The opinion of the district court (App., *infra*, 4a-41a) is reported at 745 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY INVOLVED

The Extradition Treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, is reprinted at 91-670 Pet. App. 70a-86a.[1]

STATEMENT

1. In February 1985, Special Agent Enrique Camarena of the Drug Enforcement Administration (DEA) was kidnapped, tortured, and murdered in Mexico. A month later, the bodies of Agent Camarena and Alfredo Zavala-Avelar, a Mexican pilot working with Camarena on drug investigations, were found outside of Guadalajara, Mexico. On January 31, 1990, a grand jury in the Central District of California returned a sixth superseding indictment charging respondent and 18 others with offenses growing out of the torture and murders of Agent Camarena and Zavala-Avelar.[2] App., *infra*, 5a-7a.

Respondent is a citizen and resident of Mexico. In 1989 and 1990, DEA officials attempted to bring re-

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[1] "91-670 Pet. App." refers to the appendix to the petition in *United States* v. *Verdugo-Urquidez*, No. 91-670 (filed Oct. 21, 1991). We have provided a copy of our petition in *Verdugo* to the respondent in this case.

[2] The sixth superseding indictment charges respondent with one count each of conspiring to commit violent acts and committing violent acts in aid of racketeering, in violation of 18 U.S.C. 371 and 1959; one count each of conspiring to kidnap a federal agent and kidnapping a federal agent, in violation of 18 U.S.C. 1201(c) and 1201(a)(5); and one count of murdering a federal agent, in violation of 18 U.S.C. 1111. The government anticipates that it would establish at trial that respondent, a medical doctor, used his medical skills to prolong the life of Camarena in order to assist his torture and interrogation by others. Gov't C.A. Br. 5.

spondent to this country through informal negotiations with representatives of the Mexican government. Those negotiations failed. The DEA continued discussions, however, with a DEA informant in Mexico, Antonio Garate-Bustamante, who had served as an intermediary between the Mexican government and the DEA. DEA Agent Hector Berrellez instructed Garate to indicate to his contacts in Mexico that the DEA was willing to pay for information leading to the arrests of the persons responsible for Camarena's death. In March 1990, Garate informed Agent Berrellez that he had "associates" in Mexico, whom he identified as former military police officers, civilians, and current police officers. Garate said that his associates thought they could apprehend respondent and deliver him to the United States. Agent Berrellez instructed Garate to tell his associates that, in return for the delivery of respondent to the DEA's custody in the United States, the DEA would pay a $50,000 reward plus expenses. App., *infra*, 7a-9a.

On the evening of April 2, 1990, five or six armed men apprehended respondent in his office in Guadalajara. Respondent was then driven to Leon, Mexico, and flown to El Paso, Texas. Respondent's plane landed in El Paso on April 3, 1990. DEA agents arrested him as he exited the plane. As of May 25, 1991, the DEA had made a partial reward payment of $20,000 to the Mexican individuals who apprehended respondent. The DEA also transported to the United States several of the persons involved in the apprehension and paid the living expenses of those persons and their families. App., *infra*, 10a-11a.

On April 18, 1990, the Embassy of Mexico presented a diplomatic note to the United States Department of State requesting a report on possible

American participation in respondent's abduction. The note added that Mexico was making its own investigation of the case. App., *infra*, 12a. On May 16, 1990, the Embassy of Mexico presented a second diplomatic note to the Department of State, stating that in the opinion of the government of Mexico, the abduction of respondent and his transfer to the United States had been accomplished with the knowledge of persons working for the United States government, "in violation of the procedure established in the extradition treaty in force between the two countries." *Id.* at 12a-13a. The note also expressed Mexico's demand for the return of respondent. *Id.* at 13a. On July 19, 1990, the Embassy of Mexico presented a third diplomatic note to the Department of State requesting the provisional arrest and extradition of Agent Berrellez and Garate because of their involvement in the removal of respondent from Mexico. *Ibid.*

2. Respondent filed a motion to dismiss the indictment based on the manner of his apprehension in Mexico. He argued that the district court lacked personal jurisdiction over him because his forcible removal from Mexico violated both the Due Process Clause and the Extradition Treaty between the United States and Mexico, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656. The district court rejected respondent's due process claim, finding it foreclosed by *Ker* v. *Illinois*, 119 U.S. 436 (1886), and *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952). The court explained that under the so-called *Ker-Frisbie* doctrine, the forcible abduction of a defendant from another jurisdiction does not impair the power of a court to try him for crimes. App., *infra*, 13a-16a.[3]

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[3] The court also rejected respondent's contention that the circumstances of his abduction fit within an exception to the

The court found merit, however, in respondent's contention that his abduction violated the extradition treaty between the United States and Mexico. As an initial matter, the court stated that the *Ker-Frisbie* doctrine is inapplicable to a claimed violation of a treaty. App., *infra*, 16a-18a. The court then determined that the extradition treaty with Mexico created enforceable rights and that respondent had standing to raise those rights. *Id.* at 18a-22a. The court held that it is the nation from which a person has been seized, and not the seized person himself, that must assert that the extradition treaty was violated. If the nation does protest that a treaty partner has secured a defendant's presence through a violation of the treaty, however, the court concluded that the defendant has "derivative" standing to raise that claim in a United States court. *Id.* at 22a. In this case, because Mexico protested respondent's abduction and demanded his return, the court held that respondent was entitled to invoke the extradition treaty in challenging the legality of his abduction. *Id.* at 23a.

The court then concluded that the United States had violated the extradition treaty through its participation in respondent's abduction. The court determined that "the DEA and its informants were integrally involved in [respondent's] abduction" and the

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Ker-Frisbie doctrine recognized by some lower courts for cases in which the defendant demonstrates governmental misconduct of "the most shocking and outrageous kind." App., *infra*, 15a, quoting *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65-66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975). The court found that respondent's allegations of mistreatment "are not worthy of belief" and that even if the allegations of mistreatment were true, the mistreatment did not rise to the level of shocking and outrageous misconduct. *Id.* at 16a.

United States was therefore chargeable with the acts of the abductors as its agents. App., *infra*, 24a-25a. The court also thought it to be "axiomatic" that a signatory to an extradition treaty violates its treaty obligations when it unilaterally abducts a person from the territory of a treaty partner, and that nation objects. *Id.* at 25a-28a.

Finally, the court ordered as a remedy that the United States immediately return respondent to Mexico. App., *infra*, 36a-37a. The court viewed that action as necessary to effectuate the principle of international law that a State must go "as far as possible" to make reparation for a violation of an international obligation and must "wipe out all the consequences of the illegal act." *Id.* at 36a, quoting 2 Restatement (Third) of the Foreign Relations Law of the United States, § 901, at 343, reporter's note 3 (1987).[4]

3. The United States appealed. While the appeal was pending, the court of appeals issued its opinion in *United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), petition for cert. pending, No. 91-670. In *Verdugo*, a different panel of the court of appeals held that when the United States authorizes or sponsors a person's forcible removal from Mexico without the consent of the Mexican government, the United States violates its obligations under its extradition treaty with Mexico. The court further held that if Mexico objects to the breach of the extradition treaty,

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[4] The district court denied respondent's request to exercise its supervisory power to dismiss the indictment. The court noted that supervisory power is available to protect judicial integrity and to deter illegal conduct, but the court determined that it need not invoke that power in this case. App., *infra*, 40a.

a defendant may assert that objection in a pending criminal proceeding. The remedy for such a treaty violation, *Verdugo* stated, is repatriation of the defendant to Mexico. 91-670 Pet. App. 2a.[5]

After summarizing the holdings of the court in *Verdugo*, the court of appeals declared that "[t]hese holdings apply *a fortiori* to the facts of this case." App., *infra*, 2a. The court observed that the government had not disputed on appeal that respondent was abducted by paid agents of the DEA and that the abduction was accomplished at the DEA's behest. *Ibid.* Thus, the court noted, it was not necessary to order a remand to determine whether the United States had authorized or sponsored the defendant's abduction, because "the requisite findings" about the government's actions had already been made. *Ibid.* The court also noted that the government of Mexico had not only "unequivocally" claimed that respondent's abduction violated the extradition treaty between the United States and Mexico, but has "at all times" insisted that respondent be repatriated to Mexico. Accordingly, the court found, "there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation."[6] *Id.* at 3a. The court concluded by stating that

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[5] After the issuance of the opinion in *Verdugo*, the panel considering this case requested the parties to file supplemental briefs explaining the effect of *Verdugo* on the present appeal. The United States expressed the view that, although the *Verdugo* decision is incorrect, the legal issues in the two cases are essentially identical and that the panel in this case was bound by *Verdugo*. Gov't Supp. C.A. Br. 1-2.

[6] The court indicated that Mexico's protests in this case were sufficient to satisfy even the standards articulated by Judge Browning in his concurring and dissenting opinion in

Verdugo "requires the dismissal of the indictment and the repatriation" of respondent to Mexico. *Ibid.*

REASONS FOR GRANTING THE PETITION

Relying entirely on its recent decision in *United States* v. *Verdugo-Urquidez*, *supra*, the court of appeals held that it violates an implied obligation in an extradition treaty for agents of the United States to bring a person to this country for criminal prosecution by means other than those provided in the treaty, and that, if the foreign government protests the removal, the courts of the United States must relinquish personal jurisdiction and order the defendant's repatriation. As we explained in our petition for a writ of certiorari in *United States* v. *Verdugo-Urquidez*, No. 91-670, that holding conflicts with a long line of this Court's decisions, generates uncertainty about the United States' obligations under its 103 extradition treaties with nations throughout the world, and improperly provides a criminal defendant with a form of immunity from prosecution in this country's courts that is not authorized by law.

As the court of appeals noted, the holdings announced in *Verdugo* apply "a fortiori" to this case. App., *infra*, 2a. In both cases, the controlling legal issues are (1) whether the *Ker-Frisbie* doctrine bars a court from disclaiming jurisdiction because of the manner in which the defendant was brought to the

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Verdugo. App., *infra*, 3a. Unlike the *Verdugo* majority, Judge Browning had questioned whether the diplomatic protests lodged by Mexico against Verdugo's removal were sufficient to confer standing on him because Mexico had not demanded his repatriation. Judge Browning would have remanded Verdugo's case to the district court for further findings on that issue. 91-670 Pet. App. 54a-65a.

United States; (2) whether the United States' extradition treaty with Mexico implicitly forbids forcible abductions; and (3) whether a defendant derives standing to allege such a treaty violation by virtue of a foreign country's protest. See Pet. 9-21, *United States* v. *Verdugo-Urquidez*, No. 91-670. The court of appeals simply relied on *Verdugo* in reaching its decision in this case.

The decision in this case differs from *Verdugo* in only one respect. In *Verdugo*, the district court had not determined whether the United States had authorized or sponsored Verdugo's abduction from Mexico. Accordingly, the court of appeals remanded in *Verdugo* for a hearing on that issue while making clear that repatriation to Mexico would be required if the United States were found to have participated in Verdugo's abduction. The court also noted that if Mexico informs the district court of a decision to withdraw its protest of respondent's abduction, Verdugo's right to claim a treaty violation would be terminated. 91-670 Pet. App. 43a, 47a. Here, the district court's findings, which the government did not challenge on appeal, established the United States' participation in the abduction of respondent, and the court of appeals held that Mexico's clear protest left no doubt that repatriation was required. Accordingly, the court affirmed the district court's order that the United States must repatriate respondent to Mexico.[7]

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[7] The court of appeals also stated that, under *Verdugo*, the indictment in this case should be dismissed. App., *infra*, 3a. Contrary to the court of appeals' statement, *Verdugo* did not hold that an indictment must be dismissed as a remedy for the sort of treaty violation asserted in this case. Moreover, the district court had expressly refused to grant respondent that

In our view, the procedural distinction between the two cases is not significant. *Verdugo* squarely decided the legal issues that we urge this Court to address, and the remand order does not undermine the suitability of that case as a vehicle for this Court's review of the question presented. The decision in this case, which applied the holdings of *Verdugo*, only underscores the importance of the legal issues raised by these cases and the need for this Court's review. For that reason, we suggest that the Court hold the petition in this case pending the disposition of the petition in *Verdugo*. In the alternative, because of *Verdugo*'s interlocutory posture, the Court may wish to grant plenary review in this case as well and consolidate it with *Verdugo*.

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form of relief, *id.* at 40a, and the court of appeals affirmed the district court's judgment. *Id.* at 3a. Nevertheless, we note that if respondent is repatriated to Mexico, the United States will lose any realistic opportunity to prove the charges against him. Respondent is a Mexican national. Under Article 9 of the extradition treaty, the government of Mexico is under no obligation "to deliver up its own nationals," although it may do so if "in its discretion, it be deemed proper to do so." 31 U.S.T. 5065. Chapter I, Article 14 of the Mexican Law of International Extradition provides that no Mexican national may be extradited to a foreign country except in exceptional cases in the discretion of the Executive. *Ley de Extradición Internacional*, Capitulo I, Articulo 14, *published in Diario Oficial* (Dec. 29, 1975) ("Ningún mexicano podrá ser entregado a un Estado extranjero sino en casos excepcionales a judicio del Ejecutivo."). To date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States. The United States has no reason to believe that, if respondent is repatriated to Mexico, the government of that country would return him to the United States under the treaty.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of *United States* v. *Verdugo-Urquidez*, No. 91-670. Alternatively, the petition should be granted and the case should be consolidated with *Verdugo*.

Respectfully submitted.

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OCTOBER 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50459

D.C. No. CR 87-0422-21-ER

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HUMBERTO ALVAREZ-MACHAIN, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued April 4, 1991—Pasadena, California
Submission Deferred April 8, 1991
Resubmitted July 22, 1991

Filed October 18, 1991

Before: Alfred T. Goodwin and Mary M. Schroeder, Circuit Judges, and Samuel P. King,* District Judge.

OPINION

PER CURIAM:

The Government appeals the district court's judgment of dismissal. We affirm. *See United States v.*

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* Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

Verdugo Urquidez, No. 88-5462, slip op. 9063 (9th Cir. July 22, 1991).

Verdugo held that the forcible abduction of a Mexican national from Mexico by agents of the United States without the consent or acquiescence of the Mexican government violates the 1980 Extradition Treaty between the United States and Mexico. *Slip op.* at 9088-90. *Verdugo* further held that the protest of the Mexican government in letters to the district court that Verdugo's abduction violated the 1980 treaty provided standing for Verdugo to assert rights under the Treaty in United States courts. *Slip op.* at 9098. Finally, *Verdugo* held that the proper remedy for such a violation of the 1980 Extradition Treaty is repatriation of the Mexican nationals seized by United States agents. *Slip op.* at 9104.

These holdings apply *a fortiori* to the facts of this case. After a full evidentiary hearing in the district court, the court found that Alvarez-Machain is a Mexican national who was forcibly seized from his medical office in Guadalajara, Mexico. The court found that appellee's abductors were the paid agents of the U. S. Drug Enforcement Agency ("DEA") and that the abduction was accomplished at the behest of the DEA. *United States v. Caro-Quintero*, 745 F. Supp. 599, 609 (C.D. Cal. 1990). These findings have not been disputed by the Government in this appeal.

In *Verdugo*, the court remanded the case to the district court for an evidentiary hearing on this and other issues. *Slip op.* at 9103. In this case, the requisite findings of United States involvement in the abduction have already been made.

An additional distinction between this case and the *Verdugo* case is that in this case the Mexican government has made several specific formal diplo-

matic protests to the United States government. The Government of Mexico has stated unequivocally that the abduction of Dr. Alvarez-Machain by United States agents violated the 1980 Extradition Treaty and general principles of international law and has at all times demanded his immediate repatriation to Mexico. Moreover, the Mexican government has stated its position on these issues unequivocally to the court in this case.

The Government of Mexico continues to insist that appellee's forcible abduction from Mexico by DEA agents violated the 1980 Treaty and that he must be returned. Thus, there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation. For this reason, the facts of this case would also satisfy the concerns set forth in Judge Browning's separate opinion in *Verdugo*. *Slip op.* at 9111, 9115.

The *Verdugo* case requires the dismissal of the indictment and the repatriation of the appellee.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

No. CR 87-422(F)-ER

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAFAEL CARO-QUINTERO, ET AL., DEFENDANTS

Aug. 10, 1990

As Corrected Aug. 14, 1990

ORDER AND OPINION

RAFEEDIE, District Judge.

Before the Court is a motion filed by defendant Humberto Alvarez-Machain to dismiss for outrageous government conduct and for lack of personal jurisdiction. Defendant argues that he is entitled to such relief because the means by which the United States secured his presence before this Court runs afoul of due process clause of the fifth amendment and international law, and undermines the integrity of the judicial system. For the reasons stated below defendant's motion to dismiss for outrageous government conduct is denied. However, the Court finds that the United States violated the extradition treaty between the United States and Mexico when it unilaterally abducted defendant from his homeland. Under these circumstances, the Court lacks jurisdic-

tion to try this defendant. Accordingly, the defendant is ordered discharged and the government is ordered to repatriate the defendant to Mexico forthwith.

INTRODUCTION

Doctor Humberto Alvarez-Machain is a Mexican national charged in connection with the torture/murder of Drug Enforcement Administration Special Agent Enrique Camarena-Salazar.[1] On May 10, 1990, Dr. Machain filed a motion to dismiss for outrageous government conduct and for lack of personal jurisdiction. Dr. Machain argues that the manner in which his physical presence within the jurisdiction of this Court was secured warrants dismissal. The Court has distilled four theories asserted as a basis for relief from the briefs filed by counsel for defendant.[2] First, Dr. Machain asserts that he has been deprived of due process of law guaranteed by the fifth amendment to the United States Constitution. A second ground is that dismissal is warranted because his presence in this country was obtained by means which violate the extradition treaty between the United States and Mexico. Third, Dr. Machain asserts that dismissal is warranted because his presence in this country was obtained by means which violate the terms of the Charters of the United Na-

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[1] The sixth superceding indictment, returned on January 31, 1990, charges Machain with conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity (18 U.S.C. § 1959), conspiracy to kidnap a federal agent (18 U.S.C. § 1201(c)), kidnap of a federal agent (18 U.S.C. § 1201(a)(5)), felony-murder (18 U.S.C. § 1111(a), 1114), and accessory after the fact (18 U.S.C. § 3).

[2] These briefs have provided the Court with little assistance toward resolving the issues raised by defendant's motion.

tions and the Organization of American States. Finally, the Court is urged to dismiss the indictment in an exercise of the Court's supervisory power.[3]

BACKGROUND

On May 25, 1990, the Court conducted an evidentiary hearing on this matter. A number of witnesses testified including Dr. Machain, DEA Special Agent Hector Berrellez, chief of "Operation Leyenda" (the DEA investigation of the Camarena murder), and DEA informant Antonio Garate-Bustamante, an admitted former advisor to Mexican drug lord Ernesto Fonseca-Carrillo. From this testimony the Court finds the following facts.

On February 7, 1985, DEA agent Enrique Camarena was kidnapped outside the American consulate in Guadalajara, Jalisco, Mexico. One month later, agent Camarena's mutilated body was found about sixty miles outside of Guadalajara along with the body of Alfredo Zavala-Avelar, a Mexican pilot who had assisted Camarena in locating marijuana plantations.

On January 30, 1985, a sixth superseding indictment was returned in this case. This indictment charges twenty-two persons, including Dr. Machain, with crimes in connection with the Camarena and Zavala torture/murders.[4] To date, seven of the

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[3] In his moving papers, defendant also argued that the indictment should be dismissed because the statutes charged do not have extraterritorial application. The Court denied this aspect of defendant's motion at the May 25, 1990, hearing of this motion.

[4] Some of the persons named in the sixth superseding indictment are charged with the murders of tourists John Walker and Alberto Radelat.

twenty-two indicted persons have been brought before this Court to stand trial on these offenses. Of the seven, three have been brought before this Court by means of covert forcible abduction from their homelands. Dr. Machain, a doctor of medicine with a specialty in obstetrics and gynecology who practices in Guadalajara, is the third such defendant.[5]

Prior to the successful abduction of Dr. Machain, the DEA attempted to secure his presence in this jurisdiction through informal negotiations with representatives of the Mexican government.

A. Negotiations with MFJP Commandante Carillo del Rey

In December, 1989, DEA informant Garate was contacted by Mexican Federal Judicial Police (MFJP) commandante Jorje Castillo del Rey. Castillo sought a meeting with the DEA to discuss the possible exchange of a Mexican national suspected of involvement in the Camarena killing for Isaac Naredo Moreno, who was residing in the United States and wanted by the Attorney General of Mexico in connection with the theft of large sums of money from politicians in Mexico. On December 13, 1989, DEA agent Berrellez and DEA Special Agent Bill Waters met with Castillo and an unidentified MFJP commandante in Los Angeles. Castillo advised the agents that he was working under Javier Orosco-

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[5] *See also, Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F.Supp. 1040 (S.D.Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990) (discussing abduction of defendant Matta-Ballesteros); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, —— U.S. ——, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (discussing abduction of defendant Verdugo-Urquidez).

Orosco, the chief of the MFJP fugitive detail in Mexico City. Castillo further advised the agents that he was present at the meeting with the full knowledge and authority of the Attorney General of Mexico. At the meeting, an agreement was struck whereby Dr. Machain would be delivered to the United States, and, upon receipt of Dr. Machain, the United States would determine the immigration status of Moreno and would begin deportation proceedings against Moreno if it were initially determined that he was deportable. The Mexican officials suggested that this arrangement be carried out "under the table" because its revelation would "upset" Mexican citizens. They emphasized that their identities should not be revealed. Castillo indicated that the delivery would be made after the Christmas holiday.

On January 7, 1990, Garate advised Berrelez that the Mexican officials required $50,000 in advance to cover the expense of transporting Dr. Machain to the United States. The agents indicated that the DEA would not front any money for the operation. This was the apparent undoing of the agreement. For several days in January, DEA agents in El Paso waited in vain for the arrival of Dr. Machain. Dr. Machain was not delivered, and the agents returned to Los Angeles.

B. Castillo del Rey's Request for a Second Meeting

On January 25, 1990, Castillo again contacted Garate and requested a second meeting with DEA officials regarding the possible exchange of Dr. Machain for Moreno. He indicated that he would be joined by Pablo Aleman-Diaz, the second highest ranking commandante in the MFJP. Though agent

Berrellez initially agreed to the meeting, he later declined in light of the tension between the Mexican government and the United States which resulted from the airing of an NBC mini-series based upon the Camarena murder and ensuing investigation.[6] Berrellez testified that he cancelled the meeting because he feared that the meeting was a "set-up" by the Mexicans. No further meetings occurred between the DEA and representatives of the Mexican government.

C. The Abduction

Prior to, during, and after these communications with representatives of the Mexican government, agent Berrellez instructed Garate to convey to Garate's contacts in Mexico that the DEA would pay for information leading to the arrest and capture of individuals responsible for the death of Special Agent Camarena. In March of 1990, Garate told Berrellez that his "associates" in Mexico believed that they could successfully apprehend Dr. Machain and deliver him to custody in the United States. According to Garate, his "associates" include former military police officers, various civilians, and at least two current police officers.

Special Agent Berrellez instructed Garate to tell his associates that the DEA would pay them a $50,000 reward plus expenses if Dr. Machain were delivered to the DEA in the United States. Berrellez testified that he received authorization to make this offer not only from his superiors in the Los Angeles division of the DEA, but also from officials in Wash-

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[6] "Drug Wars: The Camarena Story" aired on NBC on January 7, 8 and 9, 1990.

ington, D.C., including Pete Gruden, Deputy Director of the DEA. Garate declared that he communicated this offer to his associates. During March, Berrellez had several discussions with Garate regarding the progress of Garate's associates in Mexico.[7] Berrellez testified that the abduction and the final terms of the abduction had been approved by the DEA in Washington, D.C., and agent Berrellez believed that the United States Attorney General's Office had also been consulted.

On April 2, 1990, at about 7:45 p.m., Dr. Machain was in his office in Guadalajara, having just finished treating a patient. Five or six armed men burst into his office. One showed Dr. Machain a badge which appeared to be the badge of the federal police. Another man placed a gun to Dr. Machain's head and told him to cooperate or he would be shot.

Dr. Machain was taken to a house in Guadalajara. One of the men hit him in the stomach as he exited the car at their request. In the house, he was forced to lay on the floor face down for two to three hours. Dr. Machain testified that he was shocked six or seven times through the soles of his shoes with a [*sic*] "an electric shock apparatus." He says that he was injected twice with a substance that made him feel "light-headed and dizzy."

Dr. Machain was then transported by car to Leon where they were joined by a "fair-skinned" man. They all boarded a twin engine airplane. Dr. Machain

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[7] Garate testified that he did not make a move without first consulting with and obtaining authorization from agent Berrellez. He testified that "I could not take any step or make any promise without checking with Mr. Berrellez on the conditions of them and under which Mr. Berrellez wanted this operation to be carried out, if he wanted it to be carried out."

asked the fair-skinned man to identify himself and to indicate where they were going. The man said that he was "with the DEA" and they were going to El Paso. Agent Berrellez testified that no DEA agents participated in the actual kidnapping.

When they arrived in El Paso on April 3, agent Berrellez, Mr. Garate, and others were waiting for them on the runway. Only Dr. Machain exited the plane. As he exited, one of the men in the plane reportedly said, "We are Mexican police, here is your fugitive." [8]

As of May 25, the DEA had made a partial reward payment of $20,000 to the Mexican abductors. In addition, the DEA evacuated seven of the abductors and their families from Mexico to the United States. Finally, the DEA continues to pay expenses for these persons in an amount of approximately $6,000 per week. Garate testified that those abductors who were not evacuated to the United States were arrested, and on some cases beaten, by the MFJP.

Upon his arrival in El Paso on April 3, Dr. Machain was asked whether he had been tortured, mistreated or abused. Dr. Machain answered that he had not, though he complained that he had injured his finger on the door of the aircraft.

Shortly after his arrival, Dr. Machain complain[ed] of a pain radiating from his chest and pressure in his chest. He received prompt medical treatment from Dr. Mesa, a Spanish-speaking physician at Thomason General Hospital in El Paso. Dr. Mesa testified that he examined Dr. Machain from head to foot and found

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[8] Agent Berrellez testified that he did not know whether the abductors were acting under the authority of their government.

no sign of mistreatment or abuse. Dr. Machain did not mention any mistreatment or abuse. Dr. Meza prescribed a pain killer. Dr. Machain was subsequently treated by various other medical personnel during his incarceration. At no time did he indicate to the treating personnel that he had been mistreated by his kidnappers.

Dr. Machain testified that he was trained in treating trauma victims. He testified his current medical practice includes the treatment of injured and traumatized patients. He testified that when he treats a patient suffering from a traumatic injury, he seeks all the relevant information that is available to the patient.

On April 18, 1990, the Embassy of Mexico presented a diplomatic note to the United States Department of State in Washington, D.C., requesting a detailed report on possible U.S. participation in the abduction of Dr. Machain.[9] The Mexican government indicated that it was making "a scrupulous investigation [of] this case." The Mexican government advised the Department of State that "if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered. . . ."

On May 16, 1990, the Embassy of Mexico presented a second diplomatic note to the Department of State.

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[9] On May 30, 1990, the Court ordered the government to submit to the Court "any documents indicating that the government of Mexico has filed an official protest regarding the abduction of defendant Machain with the United States government" as well as translated transcriptions of any such documents. The diplomatic notes referred to in this opinion were submitted to the Court by the government pursuant to this Order.

The note stated that "[t]he Government of Mexico considers that the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries." In the note, the government of Mexico demanded Machain's return to Mexico.

On July 19, 1990, the Embassy of Mexico presented a third diplomatic note to the Department of State requesting the provisional arrest and extradition of Garate and Special Agent Berrellez for prosecution in Mexico for crimes relating to the abduction of Dr. Machain.

DISCUSSION

I. Dr. Machain's Due Process Claim

Dr. Machain argues that this Court lacks jurisdiction over him because his abduction denies him due process of law as guaranteed by the fifth amendment.

In *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), the Supreme Court established the long standing rule of law that a forcible abduction does not offend due process and does not require that a court dismiss an indictment for the loss of jurisdiction on those grounds. The Supreme Court reaffirmed this rule in *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). These cases form the basis of the *Ker-Frisbie* doctrine.

In *Ker*, the defendant challenged his conviction alleging that he had been kidnapped in Peru and brought into Illinois to stand trial against his will. The Court held that forcible abduction is not a

ground to challenge jurisdiction over the person. *Id.* at 444, 7 S.Ct. at 229. In *Frisbie*, defendant sought a writ of habeas corpus challenging his detention in Illinois. He alleged that while he was living in Michigan, he was forcibly seized by Michigan officers, handcuffed and blackjacked (flogged) and taken to Michigan. The Court rejected the defendant's contention that he should be released due to the manner in which Illinois secured his presence in that jurisdiction.

> The Court has never departed from the rule announced in *Ker*, that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of forcible abduction. . . . There is nothing in the Constitution that requires a court to permit a guilty person to escape justice because he was brought to trial against his will.

Frisbie, 342 U.S. at 522, 72 S.Ct. at 511-12. Subsequent opinions of the Court hold fast to this doctrine. *See e.g., Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975) (illegal arrest or detention does not void a subsequent conviction); *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980) ("Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the government of the opportunity to prove his guilt through introduction of evidence wholly untainted by the police misconduct."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) ("the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest").

Despite these clear, and, in some cases, recent pronouncements from the Supreme Court, the Second and Ninth Circuits have recognized an exception to the *Ker-Frisbie* Doctrine. The Second Circuit requires a court to divest itself of jurisdiction over the defendant where the defendant establishes governmental conduct "of the most shocking and outrageous kind." *United States ex rel Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir.) *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975). As framed by the Ninth Circuit, a defendant must make "a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States" to fit within the exception to the *Ker-Frisbie* doctrine. *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985, 96 S.Ct. 392, 46 L.Ed.2d 302 (1975); *see also, United States v. Valot*, 625 F.2d 308 (9th Cir.1980) (dismissal of an indictment is warranted only where a defendant demonstrates governmental misconduct "of the most shocking and outrageous kind" (quoting *Gengler*, 510 F.2d at 65-66)).[10]

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[10] This Court is not aware of any case in which an indictment has been dismissed under an exception to the *Ker-Frisbie* doctrine. *See also, Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir. 1990) (unaware of any such case). Obviously the conduct must be more barbaric than that alleged in *Frisbie* (blackjacking). The Ninth Circuit has indicated that the conduct alleged in the Second Circuit case of *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), is "shocking to the conscience." *United States v. Fielding*, 645 F.2d 719, 723 (9th Cir. 1981). In *Toscanino*, the defendant alleged that he had been kidnapped in Peru, and brutally tortured and interrogated for 17 days and held incommunicado for a period of

While the Court finds that Dr. Machain's abductors were paid agents of the United States, Dr. Machain's allegations of mistreatment, even if taken as true, do not constitute acts of such barbarism as to warrant dismissal of the indictment under the case law. Moreover, Dr. Machain's allegations of mistreatment are not worthy of belief. Dr. Machain, a medical doctor trained in trauma care, testified that shortly after his arrival in the United States he developed chest pains. Yet when he sought relief from various examining medical personnel, he failed to relate to them that he had been repeatedly shocked with an electrical apparatus the day before these pains developed. Surely Dr. Machain would have relayed this information to his treating physicians had he actually been repeatedly shocked. Under these circumstances, Dr. Machain's recent allegations of abuse are simply not credible.

Defendant has failed to demonstrate that his case fits within the narrow exception to the *Ker-Frisbie* doctrine. Accordingly, defendant's motion to dismiss on due process grounds is denied.

II. The Extradition Treaty

Dr. Machain contends that this Court lacks jurisdiction because his abduction violates the Extradition Treaty Between the United States and the United Mexican States which took force on January 25, 1980. 31 U.S.T. 5059, T.I.A.S. No. 9656.

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time and denied food and water, all with the knoweldge of the Assistant United States Attorney. 500 F.2d at 275. The Second Circuit has suggested that the Toscanino showing is the minimum required showing to invoke the doctrine. *See, United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981).

A. *Ker* Doctrine Inapplicable

As discussed earlier, the *Ker-Frisbie* doctrine is a constitutional doctrine which limits application of the due process clause of the fifth amendment for the purpose of dismissing an indictment. The doctrine has no application to violations of federal treaty law. This is illustrated by the Court's holding in *United States v. Rauscher*, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), decided the same day as *Ker*. In *Rauscher* the Court held that an extradited person physically present within a court's jurisdiction

> can only be tried for one of the offenses described in that treaty, and [only] for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

Id. at 430, 7 S.Ct. at 246 (defining the "doctrine of specialty"). Similarly, in *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927), involving a challenge to the lower court's jurisdiction based upon a treaty between the United States and Britain, the Court found that the *Ker* doctrine had no application, holding that where "a treaty of the United States is directly involved . . . the question is quite different." *Id.* at 606, 47 S.Ct. 535. *See also, Cook v. United States*, 288 U.S. 102, 121, 53 S.Ct. 305, 312, 77 L.Ed. 641 (1933) (*Ker* doctrine inapplicable where basis for relief is treaty violation); *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir.1974) ("*Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forc-

ible abduction in violation of a treaty"); *United States v. Ferris*, 19 F.2d 925, 926 (N.D.Cal.1927) ("The prosecution contends . . . that courts will try those before it, regardless of the methods employed to bring them here. There are many cases generally so holding, but none of authority wherein a treaty or other federal law was violated, as in the case at bar. That presents a very different aspect and case. 'A decent respect for the opinions of mankind,' national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed [and] require that treaties shall not be reduced to mere 'scraps of paper.' ").

B. Invoking an Extradition Treaty in U.S. Courts

1. self-executing vs. executory treaties

Treaties are the "Supreme Law of the Land." U.S. Const. art. VI, cl. 2. However, the American legal system recognizes a distinction between "self-executing" treaties and "executory" treaties. A self-executing treaty is federal law which must be enforced in federal court unless superseded by other federal law. A self-executing treaty is enforceable without resort to implementing legislation by Congress. On the other hand, an executory treaty is not enforceable until Congress has enacted implementing legislation. Absent such legislation, an infraction of an executory treaty "becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress. . . ." *Head Money Cases*, 112 U.S. 580, 598-99, 5 S.Ct. 247, 253-54, 28 L.Ed. 798 (1884). An executory treaty is not enforceable in American courts. *See generally*, Restatement (Third)

of the Foreign Relations Law of the United States § 111 (1987) ("Restatement").

Extradition treaties by their nature are deemed self-executing and thus are enforceable without the aid of implementing legislation. 1 M. Bassiouni, International Extradition: United States Law & Practice, Ch. 2, § 4.1, pp. 71-72, § 4.2, p. 74 (2d ed. 1987) ("Bassiouni").[11]

2. Standing

Whether a treaty is self-executing is a question distinct from whether a party has standing to enforce its terms. Restatement § 111, comments g, h. Thus a second question arises. Who may raise a violation of the treaty—the extradited person, the offended sovereign, or both?

a. standing to raise forcible abduction as a violation of an extradition treaty

"Ordinarily, claims for violation of an international obligation may be made only by the state to whom the obligation is owed." Restatement § 902, comment a; *see also*, Restatement § 906, comment a. Many courts have held that only the sovereign may object to the method of securing a person's presence as violative of the procedures of an extradition treaty. For example, in *United States v. Reed*, F.2d 896 (2d Cir.1981), the defendant complained that he was unilaterally abducted by the CIA from the island of Bimini in the Bahamas and forcibly brought to Fort Lauderdale, Florida. *Id.* at 901. The defendant

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[11] Moreover, Congress has enacted legislation providing that extradition is to be undertaken by virtue of a treaty and subject to judicial proceedings in federal district court in accordance with the provisions of the statute. 18 U.S.C. § 3181 *et seq.* (1948).

claimed that his abduction violated the extradition treaty in effect between the United States and the Bahamas. The Second Circuit found that Reed had no standing to raise this argument. "[A]bsent protest or objection by the offended sovereign, Reed has no standing to raise violation of international law as an issue." *Id.* at 902. *See also, United States v. Valot*, 625 F.2d 308, 310 (9th Cir.1980) (in response to allegation that abduction violated extradition treaty the court held that "[e]ven where a treaty provides certain benefits for nationals of a particular state . . . individual rights are only derivative through the states." (*quoting, United States v. ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975)); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.1990) (in response to allegation that abduction violated extradition treaty the court held that "[i]t is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved."); *United States v. Cordero*, 668 F.2d 32, 38 (1st Cir. 1981) (in response to allegation that abduction violated extradition treaty the court held that "it is the contracting foreign government, not the defendant that would have the right to complain about a violation"); Restatement § 432 R.N. 3 ("Under prevailing practice, . . . states ordinarily refrain from trying persons illegally brought from another state only if that state demands the person's return.") According to this line of authority, only the sovereign may raise a claim that the method of securing a person's presence violates the procedures of an extradition treaty.

b. distinguished from standing to raise the "doctrine of specialty"

The precise standing issue in the present case must be distinguished from the issue of who has standing to invoke the "doctrine of specialty" because some courts have held that either the state *or* the individual may raise the "doctrine of specialty." The doctrine of specialty prohibits the requesting nation from prosecuting an extradited individual for any offense other than that for which the extraditing state agreed to extradite. *United States v. Rauscher*, 119 U.S. 407, 430, 7 S.Ct. 234, 246, 30 L.Ed. 425 (1886); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882, 107 S.Ct. 271, 93 L.Ed.2d 247 (1986). The doctrine addresses only the permissible *scope of prosecution* of a person brought to this country through extradition proceedings, rather than the permissibility under the treaty of the means by which a person's presence is secured.

There is a split in the circuits as to whether an individual has standing to raise the doctrine of specialty with regard to an extradition. *Leighnor v. Turner*, 884 F.2d 385 (8th Cir.1989) (collecting cases). While the Ninth Circuit has held that an extradited individual may raise this doctrine, *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009, 107 S.Ct. 652, 93 L.Ed.2d 707 (1986), it is difficult to discern the basis for this holding.[12] It may be argued that by affirmatively

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[12] The *Najohn* court cited *Rauscher* for this proposition. While the *Rauscher* Court spoke of "the right conferred upon persons brought from a foreign country into this under [extradition] proceedings," 119 U.S. at 424, 7 S.Ct. at 243, in *Rauscher* there had already been a protest by the government of Britain to *Rauscher's* prosecution. *See, Ford v. United*

undertaking extradition proceedings and limiting the scope of prosecution by the receiving state, the sending state implicitly protests prosecution on any base not specified by the bill of extradition. This implicit protest thereby vests the individual with the sending state's rights and standing in that regard.

Dr. Machain's claim would not appear to fall within the confines of the doctrine of specialty nor the rationale for individual standing. Dr. Machain is not asserting that he is being prosecuted for a crime other than that to which Mexico agreed during the extradition proceedings. Indeed, no extradition proceedings have occurred which might be construed as an implicit protest to Dr. Machain's prosecution for the crimes charged. Rather, Dr. Machain claims that the method of his abduction violated the extradition treaty between the United States and Mexico by unilaterallly bypassing the extradition procedures altogether. Under these circumstances, there is no act by the sending state which can be construed as an implicit protest. This Court holds that it is for the state, and not the individual, to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty. The individual's standing to raise this claim is purely derivative of that of the state.

States, 273 U.S. at 615, 47 S.Ct. at 538 (*Rauscher* "was decided at the end of a prolonged controversy between Great Britain and the United States, through their State Departments"); *see also*, *United States v. Kaufman*, 858 F.2d 994, 1009 (5th Cir. 1988) (noting same and concluding that in *Rauscher* the sovereign had invoked its rights). Thus in *Rauscher*, the individual defendant had *derivative* standing because the sovereign protested under the treaty and thereby vested the individual with standing to invoke its rights.

c. Mexico has expressly and adequately protested and thereby vested Dr. Machain with its rights under the extradition treaty

Little authority exists as to what constitutes a protest by a sovereign for the purpose of raising a treaty violation in federal court.[13] In *Gengler*, the Second Circuit stated that to support such a claim, a defendant would have to prove the sovereign "registered an official protest with the United States Department of State." 510 F.2d at 67 n. 8; *see also*, *Matta-Ballesteros ex rel. Stolar v. Henman*, 896 F.2d 255, 260 (7th Cir.1990) (requiring "an official protest").

The Embassy of Mexico has presented a diplomatic note to the United States Department of State in Washington, D.C. concluding that U.S. agents violated the terms of the extradition treaty by unilaterally abducting Dr. Machain, and demanding Dr. Machain's return to Mexico. Mexico has adequately protested and raised any rights it has under the extradition treaty in force between the United States and Mexico. Accordingly, Dr. Machain has derivative standing to invoke those rights. The legality of Dr. Machain's abduction under the extradition treaty is therefore squarely before the Court.

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[13] Counsel for Dr. Machain has submitted a stipulation signed by the parties which reads: "It is hereby stipulated, by and between the United States Attorney, and defendant Humberto Alvarez Machain [sic], by and through his counsel, Robert K. Steinberg, that the Mexican Government has objected to the circumstances of the apprehension of defendant Alvarez-Machain in Mexico." The fact that the parties have stipulated that the Government of Mexico has "objected" does not make it so, nor confer derivative standing upon defendant.

C. The United States Participation in the Abduction of Dr. Machain Violated the Extradition Treaty

In opposition to this motion, the government makes two arguments why the United States has not violated the terms of the extradition treaty. First, the government argues that it did not violate the treaty because United States personnel did not personally participate in the abduction in Mexico. Second, the government argues that, even if the United States is chargeable with the conduct of the Mexican abductors, there has been no violation of the extradition treaty because there has been no formal extradition. Neither of these arguments is tenable. The United States is responsible for the actions of its paid agents, and a unilateral abduction by the United States when combined with an official protest from the government of Mexico constitutes a violation of the extradition treaty between these two sovereigns.

1. State responsibility

The record reveals that the DEA and its informants were integrally involved in Dr. Machain's abduction. Prior to the kidnapping, the DEA induced the abductors with the offer to pay a $50,000 reward for the successful abduction of Dr. Machain, and promised to reimburse these individuals for their expenses. These promises were communicated to the abductors prior to the abduction. The DEA gave the go ahead for the abduction. This command was approved at the highest levels of the DEA. The United States Attorney General's office appears to have been consulted. Upon completion of the abduction, the DEA paid a $20,000 reward to the abductors and their

families. In addition, many of the abductors and their families have been relocated to the United States. The United States pays approximately $6,000 per week in living expenses for the relocated abductors.

> [I]t is clear that state responsibility attaches to acts committed by agents of a state or by private individuals acting on behalf of the state. In the latter instance, the type of connection which must be established between the individual (acting privately) and the state (in order to impute that individual's act to the state) is not very clear. . . . There is, however, no ambiguity in cases where the state, through its agents, incited, encouraged or induced private individuals to undertake such actions with a view to benefit from its outcome.

1 Bassiouni, Ch. 5, § 5.2, p. 216; *compare*, *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985, 96 S.Ct. 392, 46 L.Ed.2d 302 (1975) (state responsible under exception to *Ker-Frisbie* doctrine for "barbarities inflicted . . . by persons who can be characterized as paid agents of the United States."). Therefore, the United States may be charged with the acts of Dr. Machain's abductors.

2. Violation of the Extradition Treaty

The government argues that there has been no violation of the extradition treaty where the United States unilaterally abducted a Mexican national from Mexican territory, because there have been no formal extradition proceedings in this case. As a basis for this contention, the government relies on the settled principle that an extradition treaty does not "purport

to describe the procedural requirements for extradition incumbent upon the rendering state." *Najohn*, 785 F.2d at 1422. *See also*, *Cordero*, 668 F.2d at 38 ("To hold that extradition treaties *forbid* foreign nationals to return criminal defendants except in accordance with the formal procedures they contain, would . . . represent a novel interpretation of those treaties.").

This principle, however, and the cases cited by the government (discussed below), do not hold, nor suggest, that an extradition treaty does not limit the permissible procedures that may be employed by the receiving state. Like all treaties, extradition treaties "[are] designed to protect the sovereignty and territorial integrity of states, and to restrict impermissible state conduct." Bassiouni, Ch. 5, § 2, p. 194. As early as *Rauscher* (1886), the Supreme Court recognized that extradition treaties exist to protect the sovereignty of the contracting states.[14]

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[14] [A]ccording to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up. This is a principle which commends itself, as an appropriate adjunct, to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation, nor any absolute obligation of public duty, to seize a person who had found asylum within its bosom, and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense, of a character which justified the government in depriving the party of his asylum. . . . It is very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties. . . . This is not only apparent from the general principle that the specific enumeration of things implies the exclusion of all others, but the entire face of the treaty, in-

While in *Rauscher* the Court was primarily concerned with the development of the doctrine of specialty as "an appropriate adjunct" to the principles of territorial sovereignty embodied in a treaty of extradition, the Court also concluded that these principles, and the treaty, limit the means by which a state may obtain jurisdiction over an individual located in the territory of the other contracting state. Thus, the *Rauscher* Court concluded that where an extradition treaty is in place, an individual "can only be taken under a very limited form of procedure. . . ." *Rauscher*, 119 U.S. at 421, 7 S.Ct. at 241.[15]

The government's contention in the present case that a state violates an extradition treaty when it prosecutes for a crime other than that for which the individual was extradited (the doctrine of specialty), but not when a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crimes it chooses, is absurd. It is axiomatic that the United States or Mexico violates its contracting partner's sovereignty, and the extradition treaty, when it unilaterally abducts a person from the territory of its contracting partner without the participation of or

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cluding the processes by which it is to be carried into effect, confirms this view of the subject. *Rauscher*, 119 U.S. at 419-420, 7 S. Ct. at 240-41.

[15] Further, in concluding that extradition treaties should be construed as protecting the territorial integrity and sovereignty of the contracting states, the court reasoned that "This is not only apparent from the general principle that the specific enumeration of things implies the exclusion of all others, but the entire face of the treaty, *including the processes by which it is to be carried into effect*, confirms this view of the subject." *Rauscher*, 119 U.S. at 419-420, 7 S. Ct. at 241 (emphasis added).

authorization from the contracting partner where the offended state registers an official protest.[16]

The cases cited by the government do not instruct otherwise.

a. *Ker v. State of Illinois*

The government attempts to rely upon *Ker v. State of Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886) (decided the same day as *Rauscher*) as a basis for asserting that there has been no violation of the extradition treaty in the present case. *Ker* provides no support for this proposition.

In *Ker*, an American private detective named Henry Julian, while in Peru, received duly executed extradition papers from the United States government which conformed to the requirements of the extradition treaty between the United States and Peru. Julian was instructed to serve these papers upon the Peruvian government to begin the extradition process. Julian failed to use these papers because the proper government of Peru was inaccessible as a result of military occupation of the capital by Chilean forces. Rather than use these papers, the detective, with the assistance of the occupying Chilean forces, forced Ker to board a vessel bound for the United States. At no time did the Peruvian government object to this procedure.

Ker challenged the state court's jurisdiction on two grounds. First, Ker objected to his forcible abduction on due process grounds. The Court rejected his due process objection and this holding formed the basis of

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[16] *Cf. Toscanino*, 500 F.2d at 277 (finding that state-sponsored kidnapping as alleged violated the territorial integrity of the sovereign and thereby violated provisions of the Charter of the United Nations and the Charter of the Organization of American States).

the *Ker-Frisbie* doctrine. Second, *Ker* claimed that his abduction violated the existing extradition treaty between the United States and Peru. The Court denied Ker's second claim finding that there was no violation of the treaty because there was no state action by the United States. The Court stated:

> In this case before us, the plea shows that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket, and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker, and carrying him out of the territory of Peru into the United States, did not act, nor profess to act, under the treaty. In fact, the treaty was not called into operation, was not relied upon, was not made the pretext of the arrest, and *the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States.*

Id. at 442-43 (emphasis added). In this context, the United States owed Peru no duty under the extradition treaty with regard to the kidnapping because the kidnapping could not be construed as the act of the United States, and therefore there had been no extradition.[17] The extradition treaty simply had no bearing on the acts of Julian as an individual, and therefore had no application to the facts of the abduction.

Therefore, *Ker* has no bearing on the present case.[18]

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[17] Peru could however seek extradition of Julian to Peru to stand trial for the kidnapping. 119 U.S. at 444, 7 S. Ct. at 229.

[18] The government also cites *Ex Parte Lopez*, 6 F.Supp. 342 (S.D. Tex. 1934), a case which relies on *Ker*. *Lopez* involved

b. cases involving consent or acquiescence of the rendering state

The government also attempts to rely upon cases involving either a joint effort by the contracting states or some other form of consent to the abduction by the rendering state. In these situations, there is no violation of the treaty because there is no affront to the rendering state's sovereignty. These cases do not apply to the instant case where there has been neither a joint effort nor consent from the Mexican government, and indeed the Mexican government has registered an official protest against the United States' acts.

In *Cordero*, 668 F.2d 32 (1st Cir.1981) for example, the defendants were arrested in Panama by Panamanian officials, sent by air to Venezuela, and then to Puerto Rico where they were convicted of various drug-related charges. In rejecting the defendants' claim that this procedure violated the extradition treaties between the United States and Panama

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facts similar to those in the present case. In *Lopez*, defendant, a Mexican national, was seized in Nuevo Laredo in Mexico by four men, and forcibly brought into the United States where he was arrested by a U.S. Marshal. The abductors appear to have been Mexican nationals. The court indicated that Mexico had protested the abduction. The court did not indicate whether the defendant based his claim for relief on the due process clause, an extradition treaty, or both. The court's entire analysis of defendant's claim, whatever it may have been, consisted of the following statement: "The cases are practically all one way that petitioner may not, under such circumstances, be discharged in a habeas corpus proceeding." *Id.* at 344. The court cited *Ker*. To the extent that the *Ex Parte Lopez* court relied upon *Ker* as holding that unilateral forcible abduction may not violate an extradition treaty, *Ex Parte Lopez* was wrongly decided for the reasons discussed in the body of this opinion.

and Venezuela, the First Circuit held that "[n]othing in the treaty prevents a sovereign nation [Panama or Venezuela] from deporting foreign nationals for other reasons and in other ways should it wish to do so." *Id.* at 37. The Court found "no basis for any inference that either Panama or Venezuela objected to the appellants' departure from their territories. To the contrary, it was Panamanian and Venezuelan authorities who deported them." *Id* at 38.

Similarly, in *United States v. Valot*, 625 F.2d 308 (9th Cir.1980) a U.S. warrant was issued for the arrest of the defendant who had violated the terms of parole by traveling to Asia. Valot was arrested in Thailand by Thai authorities, and eventually escorted to the Bangkok airport by Thai immigration officials where he was received by DEA agents and flown to the United States. *Id.* at 309. Since Thai officials aided in Valot's removal to the United States, the court held that the extradition treaty was not violated. *Id.* at 310. "[W]here no demand for extradition is made by the United States and the defendant is deported by the authorities of the other country which is party to the treaty, no 'extradition' has occurred and failure to comply with the extradition treaty does not bar prosecution." *Id. See also, Lovato*, 520 F.2d at 1272 (no violation of extradition treaty as a result of "routine expulsion by Mexican officials of an undesirable alien"); *Stevenson v. United States*, 381 F.2d 142, 144 (9th Cir.1967) (no violation of extradition treaty where defendants were deported by Mexican immigration officials); *United States v. Herrera*, 504 F.2d 859 (5th Cir.1974) (no violation of extradition treaty where defendant was deported from Peru to the United States by Peruvian officials and United States officials); *Matta-Balles-*

teros, 896 F.2d at 261 (no violation of extradition treaty as a result of joint abduction by U.S. agents and Honduran agents where Honduran government did not protest abduction); *United States v. Sobell*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873, 78 S.Ct. 121, 2 L.Ed.2d 77 (1957).[19]

In the present case, there has been no joint effort by the United States and Mexico. The record reveals

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[19] In *Sobell*, the appellant (Sobell) alleged that he was abducted from Mexico by Mexican Security Police acting as agent of the United States F.B.I., and delivered to U.S. agents at the United States border. The Second Circuit concluded that "Appellant was deported from Mexico." *Id.* at 523. There was no protest filed by Mexico. In reaching its conclusion that the extradition treaty had not been violated, the Second Circuit did not rely upon the joint participation of the Mexican officials, nor the failure of Mexico to protest to the abduction. Inexplicably, the Second Circuit based its ruling upon a finding that there was no state responsibility on the part of the United States for the acts of the Mexican Secret Police who were presumed for the purposes of the motion to be "agents" of the F.B.I. The Second Circuit court rejected Sobell's contention that, "The acts of the United States agents in initiating, planning and participating in the seizure" would impose state responsibility on the United States. *Id.* at 525. The court held that "it can hardly be maintained, still assuming the truth of appellant's charges, that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more the acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive [in *Ker*]. We think that the question presented in indistinguishable from that before the Supreme Court in *Ker*, and that our decision here is controlled by that case." *Id.* The Court questions what formulation of state responsibility the *Sobell* court was applying. In any event, as discussed earlier in this opinion, in the present case the Court finds that the United States is chargeable with the acts of its paid agents, Garate's associates.

no participation in the abduction by the Mexican government. Rather, the record reveals that earlier negotiations between the United States and known representatives of Mexico for an exchange of fugitives had broken down. When Mexico attempted to revive those negotiations, the United States refused. The United States then unilaterally proceeded with the abduction without the knowledge or participation of the Mexican government.

The fact that two of the abductors appear to have been active Mexican police officers is of no consequence. They were clearly acting outside the scope of their authority. The government of Mexico has indicated that they violated the Mexican constitution and the extradition treaty. *Compare*, *Ker*, 119 U.S. at 443, 7 S.Ct. at 229 (the acts of Julian were "without any pretense of authority under the treaty or from the government of the United States."). The Mexican government has arrested its citizens who participated in those acts, and has requested extradition of Berrellez and Garate for prosecution in Mexico for kidnapping. Finally, the government of Mexico has formally protested these acts to the United States Department of State and has indicated that they endanger the binational efforts of the United States and Mexico in the fight against drug trafficking.

Nor can the United States complain that it was misled into believing that Garate's associates acted under the authority of the Mexican government. Unlike his testimony with regard to Castillo, agent Berrellez testified that he did not know whether Garate's associates were acting under the authority of the Mexican government. Apparently this was not a crucial consideration.

The remaining cases cited by the government are inapposite because, although they did not involve joint

abductions, the rendering state did not register a protest to the abduction. Courts have held that where the offended state fails to register a protest to an abduction, that state acquiesces to the unilateral act of the receiving state, and there is no violation of international law. In *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975) for example, DEA agents hired an individual to lure Lujan from Argentina by posing as a business man who needed Lujan (a pilot) to fly him to Bolivia. In Bolivia, Lujan was "promptly taken into custody by Bolivian police who were not acting at the direction of their own superiors or government, but as paid agents of the United States." *Id.* at 63. The Bolivians, acting together with American agents, then placed Lujan on a plane heading for New York. *Id.* The court held that "the failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred." *Id.* at 67. *See also*, *United States v. Toro*, 840 F.2d 1221, 1235 (5th Cir.1988) (no violation of extradition treaty when DEA agents removed individual from Panama without complying with extradition procedures where "neither party to the treaty has objected to de la Pava's extradition"); *United States v. Reed*, 639 F.2d 896 (2d Cir.1981) (no violation of extradition treaty where Bahamian government did not seek the return of defendant and did not protest abduction).

The present case is distinguished from those cited by the government because there is no indication that Mexico has participated in or consented to this abduction, and Mexico has registered a protest to this abduction. The Court notes that the Ninth Circuit

has consistently chosen language which preserves this distinction. In *Najohn*, the Ninth Circuit noted that "the surrender of the defendant [under an extradition treaty] requires the cooperation of the surrendering state" and that an extradition treaty does not "purport to describe the procedural requirements for extradition incumbent upon the *rendering* state." 785 F.2d at 1422 (emphasis added). In *Stevenson* the Ninth Circuit held that "[w]hile the formalities of extradition may be viewed by *the parties* to the treaty, a demand in some form by one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, *deporting* or otherwise unilaterally *removing* unwelcome aliens." 381 F.2d at 144 (emphasis added). In *Valot*, the Ninth Circuit held that "where no demand for extradition is made by the United States and the defendant is *deported* by the authorities of the other country which is a party to the treaty, no 'extradition' has occurred and failure to comply with the treaty does not bar prosecution." 625 F.2d at 310 (emphasis added).[20]

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[20] Similarly, the Court in *Ker*, 119 U.S. 436, 7 S.Ct. 225, wrote:

> [It cannot] be doubted that the government of Peru could, of its own accord, without any demand from the United States, have surrendered *Ker* to an agent of the state of Illinois, and that such surrender would have been valid within the dominions of Peru. . . . The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him [Ker] to demand and insist upon security in such an asylum. The treaty, so far as it regulates [Ker's] right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice; so that, on proper demand and proceedings had therein, the government of the country of the

In the present case, the United States acted unilaterally, without the participation or consent of the Mexican Government, and the Mexican government has registered an official protest to these actions. Given these facts, the United States has violated the extradition treaty between the United States and Mexico.

C. Remedy

Under international law, a state that has violated an international obligation to another state is required to terminate the violation and make reparation to the offended state. Restatement § 901. "[T]he reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Restatement § 901 R.N. 3.

In *Toscanino*, the second Circuit applied this principle to an abduction similar to that in the present case. There, the Second Circuit recognized "a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the

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asylum shall deliver him up to the country where the crime was committed. And *to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.*

Id. at 42, 7 S.Ct. at 228 (emphasis added). The Court simply then went on to hold that the United States had not participated in Ker's abduction and therefore there had been no violation of the treaty. Under these circumstances, the United States owed Peru no duty with regard to the abduction of Ker by Julian, though Peru could seek extradition of Julian from the United States. *Id.* at 444, 7 S.Ct. at 229.

return of the person kidnapped." *Toscanino*, 500 F.2d at 278; *see also*, 1 Bassiouni, Ch. 5, § 5.4, p. 235. Similarly, in *Rauscher*, the Court held that where a receiving state seeks to prosecute an individual for crimes other than those for which she or he was extradited, the receiving state must first afford the individual an opportunity to return to the country from which he or she was received, or be in violation of the treaty. 119 U.S. at 430, 7 S.Ct. at 246.

The remedy in the present case is the immediate return of Dr. Machain to the territory of Mexico. Accordingly, the United States is hereby ordered to return him to the territory of Mexico.

III. The Charter of the United Nations and Charter of the Organization of American States

Dr. Machain attempts to invoke provisions of the Charter of the United Nations[21] and Charter of the Organization of American States.[22] He argues that his abduction by paid agents of the United States violates these international instruments and warrants dismissal of the indictment. The Court need not reach these issues in light of its holding with regard to the extradition treaty. The Court notes

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[21] The U.N. Charter obligates "All members" to "refrain . . . from the threat or use of force against the territorial integrity of political independence of any state." U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, art. 2 para. 4.

[22] The O.A.S. Charter provides that the "territory of a state is inviolable; it may not be the object, even temporarily . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever. . . ." O.A.S. Charter, April 30, 1948, 2 U.S.T. 2394, TIAS No. 2361, as amended by the Protocol of Buenos Aires, February 27, 1967, 21 U.S.T. 607, TIAS No. 6847, art. 20[17].

however, that while the United States' participation in the abduction of Dr. Machain would appear to violate these international instruments,[23] the weight of authority indicates that these international instruments are not self-executing and therefore are not enforceable in federal courts absent implementing legislation.[24] Dr. Machain has failed to cite author-

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[23] *See Toscanino*, 500 F.2d at 277.

[24] *See, Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 n. 5 (7th Cir.1985) (U.N. Charter provisions not self-executing); *Spiess v. C. Itoh & Co. (America) Inc.*, 643 F.2d 353, 363 (5th Cir.1981), *vacated on other grounds*, 457 U.S. 1128, 102 S.Ct. 2951, 73 L.Ed.2d 1344 (1982) (U.N. Charter not self-executing); *People of Saipan, By and Through Guerrero v. U.S. Dept. of Interior*, 502 F.2d 90, 102 (9th Cir.1974), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975) (Trask, J., concurring) (U.N. Charter not self-executing); *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir.) *cert. denied*, 382 U.S. 816, 86 S.Ct. 36, 15 L.Ed.2d 63 (1965) (provision of U.N. Charter not self-executing and does not invalidate provision of immigration law); *Vlissidis v. Anadell*, 262 F.2d 398, 400 (7th Cir. 1959) (U.N. Charter does not supercede quota system of United States immigration law); *Manybeads v. United States*, 730 F. Supp. 1515, 1521 (D.Ariz. 1989) (U.N. Charter not self-executing); *Pauling v. McElroy*, 164 F.Supp. 390, 393 (D.D.C.1958), *aff'd*, 278 F.2d 252 (D.C.Cir.) (per curiam), *cert. denied*, 364 U.S. 835, 81 S.Ct. 61, 5 L.Ed.2d 60 (1960) (U.N. Charter not self-executing)); *Camacho v. Rogers*, 199 F.Supp. 155, 158 (S.D.N.Y. 1961) (provisions of U.N. Charter not self-executing); *Sei Fujii v. California*, 38 Cal.2d 718, 722-25, 242 P.2d 617 (1952) (U.N. Charter not self-executing); *In re Alien Children Ed. Litigation*, 501 F.Supp. 544, 590 (S.D.Tex.1980) (Article 47 of O.A.S. Charter not self-executing); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.9 (2d Cir.1980) (O.A.S. Charter not self-executing) (dicta); *Doe v. Plyler*, 628 F.2d 448, 453 (5th Cir.1980) (Protocol of Buenos Aires not self-executing) (dicta).

Other courts have held that these instruments are not "self-executing" in the sense that they do not confer judicially en-

ity to the contrary.[25]

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forceable rights upon individuals. *See e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C.Cir.), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1984) (Bork, J., concurring) (U.N. Charter not "self-executing").

[25] While defendant may attempt to rely upon *Toscanino*, 500 F.2d 267 (2d Cir.1974), a close reading of that decision reveals that it is inapposite. While the *Toscanino* court found that the defendant had alleged acts by the U.S. government that would constitute violations of the U.N. and O.A.S. Charters if shown to be true, that court did not hold that these international agreements were controlling law enforceable in federal court. Rather, the Second Circuit examined these international instruments as evidence of *principles* of international law (as opposed to international agreements). In this capacity, the Charters were relevant to assist the court in determining whether the government's conduct might violate a defendant's rights protected by principles of customary international law and might warrant an exercise of that court's supervisory powers. *Id.* at 276-79. In *Filartiga*, the Second Circuit explained its earlier holding in *Toscanino:*

> We observe that this Court has previously utilized the U.N. Charter and the Charter of the Organization of America States, another *non-self-executing* agreement, as evidence of binding principles of international law. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In that case, our government's duty under international law to refrain from kidnapping a criminal defendant from within the borders of another nation, where formal extradition procedures existed, infringed the personal rights of the defendant, whose international law claims were thereupon remanded for a hearing in the district court.

Filartiga, 630 F.2d at 882 n.9 (emphasis added). To the extent that these Second Circuit cases suggest that principles of international law may provide a defendant substantive rights in federal court, this proposition has been rejected by the Ninth Circuit. *United States v. Davis*, 905 F.2d 245, 248 n.1 (9th Cir. 1990) ("International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts.").

IV. Supervisory Power

Finally, Dr. Machain seeks dismissal of the indictment under the Court's supervisory power.

A court must not allow itself to be made an "accomplice[] in willful disobedience of law." *McNabb v. United States*, 318 U.S. 332, 345, 63 S.Ct. 608, 615, 87 L.Ed. 819 (1943). Guided by considerations of justice, a court may exercise it's [*sic*] supervisory power as necessary to preserve judicial integrity and deter illegal conduct. *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). This Court takes note that Dr. Machain is but one of three defendants named in this indictment, or in preceding indictments in this case, to be brought before this Court by forcible abduction from his homeland.

Today, this Court need not rest its decision upon its supervisory power, and does not do so. However, the Court admonishes the DEA to heed Judge Oakes' warning made fifteen years ago, which this Court now adopts: "[W]e can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power. . . . To my mind the Government in its laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interest of the greater good of preserving respect for the law." *United States v. Lira*, 515 F.2d 68, 73 (2d Cir.), *cert. denied*, 423 U.S. 847, 96 S.Ct. 87, 46 L.Ed.2d 69 (1975) (Oakes, J., concurring).

IT IS SO ORDERED.

It is further Ordered that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45131

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No. 91-712

FILED
NOV 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal courts may try a Mexican national kidnapped by agents of the Drug Enforcement Administration in violation of the Extradition Treaty between the United States and Mexico after the Government of Mexico has made unequivocal and repeated protests and a formal demand for his repatriation.

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No. 91-712

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the Petition for a Writ of Certiorari filed by the United States in this case.

STATEMENT

Respondent Dr. Humberto Alvarez-Machain is a medical doctor who resides in Guadalajara, Mexico. In April 1990 he was kidnapped by agents of the U.S. Drug Enforcement Agency (DEA) in his medical office and forcibly transported to Texas where he was taken into custody by waiting DEA officials.[1] The Government has not challenged the district court's findings of DEA responsibility for Respondent's abduction.

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[1] Respondent claimed that he was subjected to "shocking" and "outrageous" treatment justifying the denial of personal jurisdiction under United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). The Ninth Circuit did not reach this issue.

Similarly, the Ninth Circuit did not reach Respondent's contention that the repatriation order was supported by the Court's supervisory power.

In a diplomatic note dated May 16, 1990, the Government of Mexico stated that Respondent had been abducted "in violation of the procedure established in the extradition treaty between the two countries." App., 13a.[2] The May 16, 1990, note further requested Respondent's repatriation to Mexico. Id.

In the Ninth Circuit the Mexican Government reiterated this unequivocal position by submitting a letter to the court in which it protested the violation of the Extradition Treaty and supported Respondent's reliance on the

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[2] "App." refers to the Appendix to the Government's Petition. "Resp. App." refers to the Appendix to this brief. "Verdugo App." refers to the Appendix to the Government's Petition in United States v. Verdugo-Urquidez, No. 91-670.

Treaty in the courts.[3] The Government of Mexico has never wavered from this position.

In addition, the Government of Mexico has stated that it is fully prepared to fulfill its obligations under the Extradition Treaty after Respondent is repatriated. Resp. App., 6a. Under Article 1 of the Extraditon Treaty, if a request for respondent's extradition was made, the Government of Mexico must either extradite Respondent or submit the case for prosecution in Mexico. Verdugo App. 70a.[4]

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[3] The text of the affidavit submitted in the Ninth Circuit by the Mexican Consul in Los Angeles is included in the Appendix to this brief.

[4] Petitioner claims that there is "no reason to believe" that Mexico will extradite Respondent under the treaty. Petition, at 10 n. 7. However, there is

REASONS FOR DENYING THE WRIT

I

THE COURTS BELOW CORRECTLY FOUND THAT THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND MEXICO BARS THE TRANSBORDER ABDUCTION OF MEXICAN NATIONALS BY U.S. AGENTS WITHOUT THE ACQUIESCENCE OR CONSENT OF THE GOVERNMENT OF MEXICO

In its Petition for Certiorari the Government makes the extraordinary claim that it may violate with impunity the Extradition Treaty between the United States and Mexico, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656 ("Extradition Treaty"), by kidnapping

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no evidence in the record of this case concerning the number of extradition requests the United States has made concerning Mexican nationals or the results of such requests. The United States has never requested Respondent's extradition; nor have they sought his prosecution in Mexican courts.

Mexican nationals from Mexican territory over the formal protest of the Mexican government. This claim has never been accepted by any court and the unprecedented nature of the Government's claim alone cannot justify review by this Court.

In contrast, the Ninth Circuit's judgment in this case is solidly rooted in this Court's precedents, see, e.g., United States v. Rauscher, 119 U.S. 407 (1886), and in the clear language and manifest purpose and intent of the Extradition Treaty between the United States and Mexico. Moreover, because this Court should not lightly assume that our Government will kidnap persons in violation of extradition treaties and over the protests of their governments,

the unique factual context of this case makes it an inappropriate candidate for plenary review in this Court.

A. The Ninth Circuit's Decision is Completely In Accord With This Court's Precedents

The outcome of this case derives from two uncomplicated propositions: First, that the Extradition Treaty prohibits the kidnapping of a Mexican national on Mexican territory by United States agents; second, that treaty violations can limit or affect the jurisdiction of United States courts.

The Extradition Treaty between the United States and Mexico explicitly provides in Article 9 that neither government "shall be bound to deliver up

its own nationals," though the extradition of nationals is contemplated as a possibility, and though each nation is compelled to prosecute those nationals it chooses not to extradite. This provision does more than merely suggest that the Treaty prohibits abduction of the other country's nationals; it makes it abundantly clear.

Indeed, a prohibition on transborder abductions is implicit in the "manifest scope and object of the treaty itself." United States v. Rauscher, 119 U.S. at 422. See also, Ford v. United States, 273 U.S. 593 (1927); Cook v. United States, 288 U.S. 102 (1933).[5]

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[5] The Ninth Circuit also had before it extensive information about the history of extradition treaties and

Based on the Treaty's language, therefore, the courts below came to the unexceptional conclusion that the unconsented to kidnapping of Dr. Alvarez-Machain by United States agents from Mexican territory violated its terms.

Nor was there anything unusual in the conclusion that, as a result of the government's incontrovertible violation of Article 9, United States courts lacked jurisdiction over the kidnapped defendant. This is a straightforward application of this Court's decisions in Rauscher, which recognized the right of an individual to challenge jurisdiction

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diplomatic practice between the United States and Mexico which supported this view of the plain language and structure of the Treaty. See Amicus Curiae brief of Lawyers Committee for Human Rights.

resulting from the breach of an implicit term of an extradition treaty, and in Cook, which held that treaty violations may deprive domestic courts of jurisdiction.[6]

Nothing in these conclusions warrants review by this Court.

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[6] This principle appears self-evident when applied to other provisions in the Treaty reflecting the legal and policy concerns of each government which would clearly be enforced by our courts. For example, Article 8 permits Mexico, which has no death penalty in peacetime, to refuse to extradite a fugitive unless it receives adequate assurances from the United States that the death penalty will not be imposed, or, if imposed, executed. Surely, were a Mexican national extradited to the United States, following such assurances, he could not thereafter be executed in violation of the Treaty. The exact same principle is at play in this case.

B. This Case Does Not Warrant Supreme Court Review Because It Presents a Unique Set of Factual and Legal Issues and Creates No Conflict Among Circuits.

This case does not warrant Supreme Court review, not only because it is a direct application of the Court's well-established precedents, but also because it involves unique circumstances. This case and the pending Verdugo-Urquidez case (No. 91-670), are the only reported cases in which a criminal defendant has been abducted by agents of the United States government over the objection of a foreign government and in plain violation of an existing extradition treaty.

Conversely, in every reported

decision involving an international abduction, beginning with Ker v. Illinois, 119 U.S. 436 (1886), there was either consent[7] or acquiescence[8] by the foreign government, the absence of an extradition treaty,[9] or the absence of any U.S. government involvement in the abduction.[10] Indeed, in Ker v. Illinois

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[7] See, e.g., United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980).

[8] See, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 259-60 (7th Cir. 1990).

[9] See, e.g., United States v. Cotten, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973).

[10] See, e.g., United States v. Lovato, 520 F.2d 1270, 1272 (9th Cir.), cert. denied, 423 U.S. 985 (1975) ("Lovato's ... allegations amount to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien.")

itself there was no United States government involvement and there was no protest from the government of Peru.

The unique facts of this case explain why there is no conflict among the Circuits on this question. For the same reason, the decisions below will have no effect on the ordinary application of the principles in the line of cases originating in Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952).

Fairly read, the decisions below are legally confined and factually specific. Contrary to the government's broad assertions, nothing in the Ninth Circuit's opinion defeats, or even casts doubt on, the ability of American courts to assert jurisdiction over foreign

defendants in circumstances where their abduction is not the responsibility of agents of the U.S. government, where there is no extradition treaty between the United States and the country where an abduction takes place,[11] or where a foreign government with which we have an extradition treaty consents to or acquiesces in the abduction or informal rendition of persons within its territory.[12] Thus, the Ker-Frisbie

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[11] This category includes Libya, Syria, Iran, Lebanon, Jordan, Yemen, Tunisia, Algeria, North Korea, the Peoples Republic of China, Viet Nam, Afghanistan, Kampuchea, Kuwait, Morocco, Ethiopia, Somalia, Sudan, and Mozambique.

[12] There are many examples of such informal renditions between the United States and Mexico. One of the most recent and sensational examples is the 1989 return of Mexican national Ramon Salcido to face capital charges of murdering his wife and children in

doctrine remains undisturbed.

In addition, this case does not involve the authority of the Executive Branch to engage in international abductions in violation of customary international law. Nor does this case affect the President's power to abrogate the obligations this country has assumed in this or any other extradition treaty. Rather, this case involves an existing treaty which has not been abrogated and which specifically restricts the circumstances in which the nationals of each country may be extradited.[13]

Thus, this case presents none of

California.

[13] Under Article 23(4) of the Treaty the United States may terminate the Treaty on six months notice. Verdugo App., 83a.

the apocalyptic issues suggested in the Government's Petition. Only if our government intends to engage routinely in the kind of snatch and grab abduction that occurred in this case, in clear violation of existing extradition treaties and over the protests of our treaty partners, will the decisions below stand in the way. There is no reason to believe that the government of the United States has adopted a policy so antithetical to a world order based on respect for the basic principles of international law and the territorial integrity of states.

II

IF THE COURT DECIDES TO GRANT THE PETITION IN UNITED STATES v. VERDUGO-URQUIDEZ IT SHOULD CONSOLIDATE THIS CASE FOR ARGUMENT AND DECISION

If this Court decides to reach the issues raised by the decisions below in United States v. Verdugo-Urquidez, No. 91-670, and this case, Respondent urges the Court to consider these issues by granting the Petition in this case or by granting the Petitions in both cases.

This case presents none of the factual uncertainties raised in Verdugo. The Government has conceded responsibility for Respondent's abduction. The Government of Mexico has, from the time of Respondent's abduction to the present, unequivocally protested the abduction as a violation

of the Extraditon Treaty, demanded Respondent's repatriation to Mexico and supported his efforts to raise the Extradition Treaty as a defense to the personal jurisdiction of U.S. courts to try Respondent. In short, the factual questions that led the Ninth Circuit to remand Verdugo for further proceedings are not presented in this case.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied. In the alternative, if this Court decides to hear argument on these issues, the Petition in this case should be granted. If the Petition in United

States v. Verdugo-Urquidez, No. 91-670, is granted, this case should be consolidated with Verdugo for argument and decision.

Dated: November 21, 1991.

Respectfully submitted,

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APPENDIX

Secretaría
De
Relaciones Exteriores

NOVEMBER 9, 1990.

Consulado General

TO THE HONORABLE JUSTICES OF THE NINTH CIRCUIT COURT OF APPEALS

RE: United States vs.
Humberto Alvarez
Machain No. 90-50459

I, JOSE ANGEL PESCADOR OSUNA, accredited at the United States Department of State as Consul General of the United Mexican States in Los Angeles, California, following the instructions of my government and in the exercise of my consular functions as provided by the 1963 Vienna Convention of Consular Relations, to which both Mexico and the United States are parties, wish to communicate to this honorable court the position of the Government of Mexico regarding the above referenced case which involves a mexican national.

In so doing, nothing in this communication or its submission shall be construed, in any way, as a waiver of the sovereign immunity which Mexico and its Consulate General enjoy in accordance with international law, nor as a submission to the jurisdiction of this Honorable Court.

In reference to this case, this communication takes into account the facts established in and adopted by the United States District Court for the Central District of California, and contained in the record before this Honorable Court.

The position of the Government of Mexico is as follows:

1.- The Government of Mexico concurs with part of the ruling of the United States District Court for the Central District of California, as stated below.

2.- A violation has been committed to the Extradition Treaty in force between the two countries (henceforth "The Treaty"), and to the General Principles of International Law.

3.- Mexico expressed its official attitude to this violation as established in the record of the district Court, via diplomatic notes to the State Department of the United States, and sought the return to Mexico of DR. HUMBERTO ALVAREZ MACHAIN.

4.- Since under the Treaty the United States had the right to request the extradition of DR. ALVAREZ MACHAIN, the Treaty was applicable to DR. ALVAREZ MACHAIN.

5.- The Treaty recognizes certain rights possessed by individuals to whom

the Treaty's provisions apply.

6.- Individuals have often gone to court to ensure observance of the rights they derive from this Treaty.

7.- It is from the Treaty itself, as well as from the official diplomatic attitude taken by Mexico to its violation in this case, that DR. ALVAREZ MACHAIN can oppose the violation to his detriment of the treaty and to the jurisdiction asserted over his person in the United States after his abduction from Mexico.

8.- The Treaty constitutes the exclusive and sole means by which the Government of the United States can seek to bring a Mexican National present in Mexico to justice. Mexican legislation in force and effect makes it illegal for Mexican Government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement or agreement, either with the United States or with any other country, to surrender its own nationals.

In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably and expressly reserved to the parties the right to refuse the requested

extradition to one of their own respective nationals, agreeing instead to prosecute them in their own national courts, in the interest of justice.

9.- The purpose and object of the Treaty, was from its inception, precisely to provide the legal framework, with which one of the parties could request of the other the extradition of persons from the territory of the former to the territory of the latter. The Treaty is binding on its parties, but serves no purpose if the parties are free to ignore its terms.

10.- The only legal means by which the United States could have pursued the prosecution of DR. HUMBERTO ALVAREZ MACHAIN, a Mexican national, was through the specific provision of the Treaty, which was negotiated, agreed upon and ratified precisely to deal, with the extradition of nationals. Article 9 its paragraph 1 that "neither contracting party shall be bound to deliver up its own nationals, but the executive of the requested party shall, if not prevented by the laws of the party, have the power to deliver them up if, in its discretion, it be deemed proper to do so". Paragraph 2, on the other hand, provides that "if extradition is not granted pursuant to paragraph 1 of this article, the requested party shall submit the case to its competent authorities for the purpose of

prosecution, provided that party has jurisdiction over the offense".

11.- The judiciary of each of the parties to the Treaty is given, through several of the Treaty's provisions, ample participation in any extradition proceeding. Therefore, the pronouncements of a nation court of one of the parties, in a case where the only legal means for bringing an individual to justice was to invoke the Extradition Treaty, in no way may be construed as an interference with the authority of the Executive branch for the conduct of Foreign Affairs.

12.- Not affirming the district court's holding in this case, would emasculate the Extradition Treaty for all practical and future effects. As governmental operations of this nature would receive implicit approval, and since abductions of Mexican suspects in the sovereign territory of Mexico would result in a legitimized assertion of personal jurisdiction, some United States authorities would find it easier not to resort to the binding terms of the Treaty.

13.- Moreover, not affirming the district court's holding in this case, would mean that a case such as the one at hand would be repeated, with all the negative diplomatic and legal consequences which have derived from it, to the detriment of the friendly

relations that should always prevail between the two countries including in law enforcement and administration of justice matters, and which relationship should be maintained within the bounds of international law.

14.- The Mexican Government does not and will not limit itself to the mere reiteration of the criteria and principles stated above. The Mexican Government is in a position to insist that there is and always was an alternative means by which the interest of justice, so that crimes do not go unpunished. The Government of Mexico maintains that, in this case, justice can be administered, but that it has to be administered legally and in conformity with the requirements forth in the Extradition Treaty.

15.- The Mexican Government is consequently prepared to put into motion the administration of justice, as soon as the Government of the United States, in compliance with article 9 of the Treaty, provides it with the necessary elements, as required by the Treaty, to enable it to comply in its turn with its treaty obligation to prosecute.

Respectfully,

JOSE ANGEL PESCADOR OSUNA
CONSUL GENERAL OF MEXICO
LOS ANGELES

Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

No. 91-712

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends (Br. in Opp. 7) that the court of appeals' decision rests on two "uncomplicated propositions": that the United States' extradition treaty with Mexico prohibits the kidnapping of a Mexican national on Mexican territory; and that treaty violations can affect the jurisdiction of the courts of the United States. We agree with respondent that these propositions are uncomplicated. As applied to the treaty at issue in this case, however, they are demonstrably incorrect.

Respondent's contentions essentially track those advanced in the brief in opposition filed by the respondent in *United States* v. *Verdugo-Urquidez*, petition for cert. pending, No. 91-670, and, for the reasons given in our reply brief in that case, respondent's

legal analysis is without merit.[1] The remedy of repatriation that the court of appeals ordered in this case squarely conflicts with the *Ker-Frisbie* doctrine [2] and a consistent line of decisions of this Court indicating that, absent clear directions in a treaty or statute, a criminal defendant enjoys no immunity from prosecution based on the manner by which he was apprehended and brought before the court. And respondent's defense of the Ninth Circuit's creation of an implied treaty obligation underscores that court's striking departure from proper principles of construction of this Nation's international obligations.

The extradition treaty does not say, clearly or otherwise, that it prohibits unilateral acts by one treaty partner to gain custody over a suspect located in the territory of the other; nor does the treaty contain any language that purports to regulate the jurisdiction of the United States courts where extradition is not involved. Respondent relies on Article 9 of the Treaty, [3] which states that an asylum state is not obligated to deliver up its nationals in response to an extradition request. That article, however, does not purport to place obligations on either country where extradition is not sought. Nor is there anything in the "manifest scope and object of the treaty itself" (Br. in Opp. 8, quoting *United States* v. *Rauscher*,

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[1] We have provided respondent with a copy of our reply brief in *Verdugo*.

[2] See *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952).

[3] Extradition Treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, 5065 T.I.A.S. No. 9656, *reprinted at* Pet. App. 74a.

119 U.S. 407, 422 (1886)) that justifies amending the treaty to impose significant obligations on conduct by a treaty partner absent an extradition request. And there is no justification for incorporating into the extradition treaty general principles of international law, derived from other sources, regarding the territorial rights of nations. Those principles are explicitly defined in other treaties and by customary international law, none of which is enforceable at the behest of private parties asserting rights in United States courts.

2. Respondent argues (Br. in Opp. 11-16) that review is not warranted because this case involves "unique circumstances." But the court of appeals' unprecedented view of its role in interpreting and applying this country's extradition treaties raises questions that are of inherent national and international importance. An indication of the character of the issues at stake is found in the fact that the government of Mexico, as it did in *United States* v. *Verdugo-Urquidez*, petition for cert. pending, No. 91-670, has filed an amicus curiae brief in this Court stating that, although Mexico agrees with the court of appeals' decision, this Court should grant review to assess "the effect on the administration of justice in the United States of the petitioner's violation of its treaty obligation to Mexico." Amicus Br. of the United Mexican States, at 7. In light of the international dimensions of this case, and the need for clarity in the application of this Nation's treaties bearing on international law enforcement, this Court's review of the question presented is warranted.

* * * * *

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the peti-

tion for a writ of certiorari should be held and disposed of in light of *United States* v. *Verdugo-Urquidez*, No. 91-670. Alternatively, the petition should be granted and the case should be consolidated with *Verdugo*.

KENNETH W. STARR
Solicitor General

DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45185

Supreme Court, U.S.
FILED
NOV 29 1991
OFFICE OF THE CLERK

No. 91-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF GRANTING REVIEW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-712

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF GRANTING REVIEW

Pursuant to Rule 37 of the Rules of this Court, the United Mexican States (Mexico) respectfully submits this brief as *amicus curiae* to urge the Court to grant the petition for a writ of certiorari and to review the effect of the United States' violation of its extradition treaty with Mexico upon the administration of criminal justice in the United States.

Both the petitioner and the respondent have consented to the submission of this brief, and their written consents have been lodged with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

Respondent Humberto Alvarez-Machain is a national of Mexico. He is a physician who specializes in obstetrics and gynecology, and he maintains a medical practice in Guadalajara, Mexico. In early-April 1990, United States law enforcement officers arranged for the respondent's abduction from Mexico and brought him to Los Angeles to stand trial on charges preferred against him and others in connection with the 1985 killing of a United States law enforcement agent, Enrique Camarena, in Mexico.

Respondent's covert and forcible abduction from Mexican territory was in direct contravention of the extradition treaty between Mexico and the United States.[1] Mexico repeatedly protested to the United States government the treaty violation, the infringement of its sovereignty and the violation of its territorial integrity. Mexico has a manifest interest in ensuring that treaties to which it is a party are interpreted and applied by the courts of its treaty partners consistently with the express terms of the treaty and in the light of their object and purpose.

It is common ground between Mexico and the United States that if the respondent is criminally implicated in the American law enforcement agent's death, he should be prosecuted. The extradition treaty, however, does not permit the United States unilaterally to determine that the prosecution of the respondent take place in the United States, nor does

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[1]Extradition Treaty between the United States of America and the United Mexican States with Appendix, done in Mexico May 4, 1978, entered into force January 25, 1980 U.S.T. 5059, T.I.A.S. No. 9656.

the treaty—as well as other related international agreements between the two States that have a direct bearing on respondent's abduction—allow United States authorities to resort to extralegal means to secure respondent's presence for trial in the United States. The United States' disregard of its solemn international commitments does not serve to uphold or advance the rule of law in international relations to which both Mexico and the United States are strongly committed. Mexico believes that its views on the violation of the extradition treaty and the attendant violation of its sovereignty and its territorial integrity which occurred in this case should be before the Court when it considers the instant petition.

STATEMENT

Respondent challenged the district court's personal jurisdiction over him on the grounds, *inter alia*, that the manner in which the United States secured his presence before the court violated the Mexico/United States extradition treaty when the United States unilaterally abducted him from his homeland. (Pet. App. 4a).

The district court conducted an extensive evidentiary hearing on the question whether United States law enforcement officials were responsible for respondent's forcible abduction from Mexico. (Pet. App. 6a). Although the United States denied that it had participated in the abduction, the court determined that prior to his abduction, the United States Drug Enforcement Agency (DEA) had unsuccessfully attempted to secure respondent's presence in the United States through informal negotiations with Mexican police authorities. (Pet. App. 7a-9a). The dis-

trict court found that, in the evening of April 2, 1990, respondent was seized by five or six armed men in his office in Guadalajara, put by force on a private plane, and flown to El Paso, Texas, where he was met by DEA agents and immediately arrested. He was flown to Los Angeles where the prosecution of seven other suspects in the Camarena case was under way. (Pet. App. 10a-11a). The district court further found that as of May 1991, the DEA had made partial reward payments of $20,000 to the Mexican individuals who abducted the respondent; that the Agency had evacuated seven of the abductors and their families from Mexico to the United States; that it pays for their weekly living expenses (*ibid.*); and, that respondent's abduction did not result from any joint effort by Mexico and the United States, or any authorized participation in the abduction by Mexican officials. The court concluded--

> Rather, the record reveals that earlier negotiations between the United States and known representatives of Mexico for an exchange of fugitives had broken down. When Mexico attempted to revive those negotiations, the United States refused. The United States then unilaterally proceeded with the abduction without the knowledge or participation of the Mexican government. [Pet. App. 33a]

Based on its factual findings, the district court ruled that the United States violated the Mexico/United States extradition treaty—

> when it unilaterally abducted . . . [respondent] from his homeland. Under these circumstan-

> ces, the Court lacks jurisdiction to try this defendant. Accordingly, the defendant is ordered discharged and the government is ordered to repatriate the defendant to Mexico forthwith. [Pet. App. 4a-5a]

The court of appeals affirmed, *per curiam*, on the basis of its earlier decision in *United States v. Verdugo Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *cert. pending*, No. 91-670.[2] (Pet. App. 1a.)

As it did in the *Verdugo* case, Mexico repeatedly protested respondent's abduction through diplomatic channels. In its first note to the United States Department of State of April 18, 1990, the Mexican Embassy in Washington requested a report on the possible participation of United States officials in the abduction of respondent. The note advised the Department of State that "if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered. . . ." (App. A at 1a).

In its second note of May 16, 1990, the Mexican Embassy informed the Department of State that "[t]he Government of Mexico considers the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries." The note concluded by

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[2] Mexico has filed an *amicus curiae* brief in that case in support of granting review.

demanding respondent's return to Mexico. (App. B at 5a).

Mexico's third note to the Department of State of July 19, 1990 requested the provisional arrest and extradition of the two individuals who were principally responsible for respondent's abduction from Mexico, DEA agent Berrellez and a Mexican national who was granted refuge in the United States. (App. C at 9a).

ARGUMENT

Amicus respectfully refers the Court to the argument presented in its brief as *amicus curiae* in support of granting review in *United States v. Verdugo Urquidez, cert. pending,* No. 91-670. The argument applies with a fortiori force to this case, in view of the district court's explicit finding that respondent's abductors were paid agents of the DEA and that the abduction was sponsored by, and accomplished at the behest of, the DEA.

CONCLUSION

Mexico urges the Court to grant the petition for a writ of certiorari to review the effect on the administration of justice in the United States of the petitioner's violation of its treaty obligation to Mexico. Mexico concurs in petitioner's alternative prayer that if the petition is granted the case should be consolidated with *Verdugo*.

Respectfully submitted,

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November 29, 1991.

APPENDIX

APPENDIX A

No. 0336

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the State Department and wishes to refer to the recent aprehension in Mexican territory and transfer to El Paso of the Mexican citizen Humberto Alvarez Machain.

According to the information that the Mexican authorities have, there is the assumption that Mr. Alvarez Machain has been kidnapped in Mexico and illegally transferred to the United States territory, with the participation of U.S. authorities.

Due to the above, the Embassy of Mexico, upon specific instructions from its Government, requests to the Department of State a detailed report and the corresponding clarification about the possible participation of U.S. authorities in Mr. Humberto Alvarez Machain's kidnap and transfer to the United States. The Mexican Government is making a scrupulous investigation about this case.

The State Department is obviously aware that if it is proven that these actions were performed with the illegal participation of U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered, since, as it is of your knowledge, it is the exclusive responsibility of the Mexican authorities the fight against drug trafficking and criminal organizations within the Mexican territory.

Due to the seriousness of this case, the Embassy of Mexico will appreciate a prompt answer and avails itself of this opportunity to renew to the Department of State the assurances of its consideration.

Washington, D.C. April 18, 1990.

To the Department of State
Washington, D.C.

APPENDIX A-1

No. 0336

La Embajada de Mexico saluda al Departamento de Estado y desea referirse a la reciente detencion en territorio mexicano y traslado a la ciudad de El Paso, del ciudadano mexicano, Dr. Humberto Alvarez Machain.

De acuerdo con la informacion con que cuentan las autoridades mexicanas, existe la presuncion de que el señor Alvarez Machain haya sido secuestrado en Mexico y trasladado ilegalmente a territorio de los Estados Unidos, con participacion de autoridades norteamericanas.

En virtud de lo anterior, la Embajada de Mexico, por instrucciones expresas de su Gobierno, solicita al Departamento de Estado un informe detallado y las explicaciones pertinentes sobre la posible participacion de autoridades norteamericanas en el secuestro y traslado a Estados Unidos del señor Alvarez Machain. Por su parte, el Gobierno de Mexico esta llevando a cabo una minuciosa investigacion sobre este caso.

No escapara al reconocido buen criterio del Departamento de Estado que, de comprobarse la participacion ilegal de autoridades norteamericanas en estos hechos, se pone en peligro la cooperacion binacional en la lucha contra el narcotrafico, pues como es de su conocimiento, corresponde exclusivamente a las autoridades mexicanas la responsabilidad del combate al narcotrafico y a las organizaciones criminales dentro del territorio de Mexico.

Al agradecer al Departamento de Estado una pronta respuesta en virtud de la seriedad de estos hechos, la Embajada de Mexico aprovecha la ocasion para reiterarle las seguridades de su consideracion.

Washington, D.C., 18 de abril de 1990.

Al Departamento de Estado
Washington, D.C.

APPENDIX B

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the State Department and wishes to refer to the apprehension in Mexican territory and the illegal transfer to the United States of Dr. Humberto Alvarez Machain.

The Government of Mexico considers the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries.

Accordingly, the procedure followed by the kidnappers and transporters of Dr. Alvarez Machain, was in violation of articles 14 and 16 of the Political Constitution of the United Mexican States, which establishes the right of due process and the equal protection under the law in connection with criminal matters. None of those constitutional rights were observed by the kidnappers and transporters.

As a consequence of those violations, which violate both the mexican Constitutional Law, as well as International Law, the corresponding Mexican authorities have already initiated a criminal action proceedings in accordance with mexican law, against the intellectual and material perpetuators of the illegal kidnapping and transfer to the United States of Dr. Humberto Alvarez Machain, because it is deemed that in such a case, the crimes of kidnapping, false imprisonment and criminal association were committed. In due time, the Mexican Government will request from the Government of the United States of America the extradition of the individuals involved in the perpetration of those crimes, if they could be found in territory of the United Stated of America, in accordance with the terms of the existing Extradition Treaty in both Countries.

The Embassy of Mexico, upon specific instructions from its Government, requests to the Department of State its intervention before the corresponding authorities so that Dr. Humberto Alvarez Machain be returned back to Mexico in order to be investigated regarding his probable participation in the crimes whose investigation and prosecution correspond to the Mexican Government. The Mexican Government respectfully requests the collaboration of the Government of the United States of America in order that such individual be tried and sentenced in Mexico with absolute respect to the mexican laws in connection with the crimes in which Dr. Alvarez Machain has participated.

The Embassy of Mexico avails this opportunity to renew to the Department of States the assurances of its consideration.

Washington, D.C., May 16, 1990.

APPENDIX B-1

No. 0419

La Embajada de México saluda atentamente al Departamento de Estado y se permite hacer referencia al secuestro en territorio mexicano y traslado ilegal a Los Estados Unidos del Dr. Humberto Alvarez Machain.

El gobierno de México considera que el secuestro y traslado de territorio mexicano al de los Estados Unidos de América del Dr. Alvarez Machain, se realizó con el conocimiento de algunas personas al servicio del gobierno de los Estados Unidos y en contravención al procedimiento establecido en el Tratado de Extradición vigente entre ambos países.

De la misma manera el procedimiento seguido por los captores y trasladantes del Dr. Alvarez Machain, fué violatorio de los artículos 14 y 16 de la Constitución Política de los Estados Unidos Mexicanos, que son los que establecen las guarantías del debido procedimiento legal para las detenciones y de la audiencia en los procesos de carácter penal. Ni una ni otra de tales garantías fué respetada por los captores y trasladantes.

Como consecuencia de estas violaciones, que afectan tanto al derecho constitucional mexicano como al derecho internacional, las autoridades mexicanas competentes ya han iniciado los procedimientos penales que en México deben llevarse a efecto, contra los autores intelectuales y materiales del secuestro y traslado ilegal a los Estados Unidos del Dr. Humberto Alvarez Machain, ya que se considera que en el caso se han dado los delitos de privación ilegal de la libertad en forma de secuestro y asociación delictuosa, y en su oportunidad el gobierno mexicano solicitará al gobierno de los Estados Unidos de América la extradición de las personas involucradas en la comisión de dichos delitos y que se encuentren en territorio de los

Estados Unidos de América, conforme al Tratado de Extradición vigente entre ambos países.

En consecuencia, la Embajada de México siguiendo instrucciones precisas de su gobierno, solicita al Departamento de Estado su intervención ante las autoridades competentes, a efecto de que sea devuelto el Dr. Humberto Alvarez Machain, para que se someta a la investigación sobre su posible participación en delitos cuya investigación y persecución corresponden al gobierno mexicano, por lo que se exhorta respetuosamente al gobierno norteamericano para que preste su colaboración, para que dicho individuo sea juzgado y sentenciado con respeto absoluto a las leyes mexicanas, respecto de aquellos delitos en los que haya participado el citado Dr. Alvarez Machain.

La Embajada de México aprovecha la oportunidad para renovar al Departamento de Estado, las seguridades de su más atenta consideración.

Washington, D.C. 16 de mayo de 1990.

Al Departamento de Estado
Washington, D.C.

APPENDIX C

UNOFFICIAL TRANSLATION

July 19, 1990
Washington, D.C.

Excellency:

On behalf of my Government, I have the honor of referring to the Extradition Treaty between the United Mexican States and the United States of America, in order to inform Your Excellency's Government that Mexican authorities request the provisional detention, for extradition purposes, of HECTOR BERRELLEZ or ARTURO E. BERRELLEZ, according to Articles 1 and 2, and especially Article 11, of the above Treaty. The reason for this request is that the above mentioned person is probably responsible for the crime of Illegal Deprivation of Liberty in its Modality of kidnapping. This crime fits into part 1 of the 2nd Article and the subparagraph number 4 of the Appendix to the Treaty. This crime was committed against Doctor Humberto Alvarez Machain for which reason criminal proceedings were filled against HECTOR BERRELLEZ or ARTURO E. BERRELLEZ which resulted in Penal Action 118/90 before the First Criminal Judge of the Federal District in the State of Jalisco, and a warrant of arrest issued on July 9, 1990.

The above detention is requested following the request to the Embassy by the Mexican Secretariat of Foreign Relations in its official letter 7 5044, dated July 16, 1990. The pertinent sections of said note are transcribed below by the undersigned—the Ambassador of Mexico to the United States of America—as if they were his own writing, for whatever legal purposes they may be needed:

". . . The Office of the Attorney General of Mexico sent note DAI/666/90, dated July 13, 1990, with basis on the Articles 102 and 119 of the Political Constitution of the United Mexican States, Article 11 of the Extradition

Treaty currently in force between the United Mexican States and the United States of America, and on Article 2, part VII, Article 9, part II, of the Internal Regulations of the Mexican Office of the Attorney General, Article 4 of the Penal Code for the Federal District in Common Law Matters and for the Republic in Federal Law Matters, and lastly in the 3rd Article of the International Extradition Act, requesting that, through diplomatic channels, the provisional detention, for extradition purposes, of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ be solicited. The First Criminal Judge of the Federal District in the State of Jalisco ordered the apprehension of these men on July 9, 1990 according to the Penal Action number 118/90, for their probable responsibility in the crime of kidnapping. The crime is sanctioned by the Articles 336, parts I, II, and V in relation to the stipulation 13, parts I, IV, and V of the Penal Code for the Federal District in Common Law Matters and for the Republic in Federal Law Matters.

The request is based fundamentally on Article 11 of the Treaty mentioned, considering also pertinent part I of Article 2 and the subparagraph number 4 of the Appendix. The crime mentioned above is of a serious nature since it is punishable in both countries with the total loss of freedom for more than one year.

The Office of the Attorney General of Mexico has named the delinquent acts of the accused who are now found to be avoiding the Mexican Justice in the following way:

On April 2, 1990, Doctor Humberto Alvarez Machain was in his medical consulting room situated in 1853 Mexicaltzingo, in the city of Guadalajara, Jalisco. Shortly after he had seen one of his patients, with the surname of Rodriguez, five men came into his office holding guns. These men who passed themselves as police agents, de-

tained Alvarez Machain while at the same time disconecting the telephone cables.

Immediately after, the accused drove the victim to Silao, Guanajuato, and from there they drove to the city of Leon of the same state so as to depart by airplane the next day, April 3, 1990, to El Paso, Texas, United States of America. The airplane used, which was brown with stripes of a darker brown, was a Turbo Commander, Model 810, with registration number XA-PEW, for 6 people, and was property of an agency denominated Aerojalisco. The plane was hired out to the kidnappers who followed the route Guadalajara—Leon—Cuidad Juarez—Guadalajara. Previous authorization for landing at the airport had been granted and the accused landed at the airport of El Paso, Texas, United States of America.

On April 28, 1990, Jorge Covarrubias Manrique, before the Agent of the Public Federal Ministry, admitted to having participated in the kidnapping of Doctor Alvarez Machain. He also admitted to have been an operative team member of the Drug Enforcement Administration (D.E.A.), ordered through ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE by HECTOR BERRELLEZ or ARTURO E. BERRELLEZ.

In the declaration presented by ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE, before the Tribunal Judge of the District of the United States of America, in the case number CR87422(F)-ER, on May 25, 1990, he declared that the kidnapping of Humberto Alvarez Machain was approved by HECTOR BERRELLEZ, who admitted to this before the same authority.

From the above mentioned facts it is presumed that ANTONIO GARATE BUSTAMENTE or JOSE ANTONIO GARATE BUSTAMANTE prepared the the kidnapping of Doctor Humberto Alvarez Machain, which took place on April 2. 1990 in the city of Guadalajara, Jalisco, in order to later transfer him to the United States of America. It is also

presumed, according to testimony, that he did it with the approval of HECTOR BERRELLEZ who was superior to him in rank at the Drug Enforcement Administration (D.E.A.). For these reasons, the First Criminal Judge of the District in Penal Matters for the State of Jalisco, after relating these events with the elements of conviction reached by the Public Federal Ministry in the verification of the crime, considered that ANTONIO GARATE BUSTAMANTE of JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ responsible for the illicit crime of ILLEGAL DEPRIVATION OF LIBERTY IN ITS MODALITY OF KIDNAPPING.

It is known that the above mentioned persons have been summoned for the judgement instituted against the victim, before the tribunal Judge of the District of the United States for the Central District of California. Therefore, for the localization of the above mentioned persons, we inform you that they are currently residing in, or around, Los Angeles, California.

For the purpose of identification, the Office of the Attorney General of Mexico submits the following information of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and annexes a photocopy of his photograph.

PLACE OF BIRTH:	AGUA CALIENTE, SINALOA, MEXICO
MARITAL STATUS:	MARRIED
AGE:	51 YEARS OLD
DATE OF BIRTH:	MAY 28, 1939
HAIR:	INSERTION OF CIRCULAR HAIR BETWEEN STRAIGHT AND ABUNDANT, GREYING BLACK
FOREHEAD:	LARGE
EYES:	BROWN
NOSE:	LARGE, DEEP, STRAIGHT, SLIGHTLY ELEVATED AND HORIZONTAL BASE
MOUTH:	SMALL WITH LARGE LIPS
CHIN:	VERTICAL INCLINATION, MEDIUM
EARS:	HEIGHT, MEDUIM WIDTH CONTOUR OF LOBE AT RIGHT
COMPLEXION:	ANGLE
BODY STRUCTURE:	WHITE
WEIGHT:	MEDIUM
HEIGHT:	APPROXIMATELY 78 KILOS 1.73 METERS

The following information of HECTOR BERRELLEZ or ARTURO E. BERRELLEZ is also submitted:

APPROXIMATE AGE:	43 TO 45 YEARS OLD
HEIGHT:	1.75 TO 1.78 METERS
BODY STRUCTURE:	ROBUST
HAIR:	CURLY, GREYING, AND SHORT
COMPLEXION:	WHITE
EYES:	LIGHT BROWN
EYELASHES:	CURLY
EYEBROWS:	ABUNDANT
NOSE:	STRAIGHT
MOUTH:	REGULAR
FACE:	ROUND
PARTICULAR SIGNS:	ON BOTH CHEEKS HE HAS SCARS FROM SMALLPOX OR ACNE.

The request for provisional detention is based on what is established by the Extradition Treaty, and therefore, the Office of the Attorney General of Mexico grants the promise of formalizing the application for extradition of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ, within the time limit established by the Treaty in reference and will start running when United States authorities succeed in the apprehension, during which lapse we will continue to send personal data for better identification and faster localization.

In view of the considerations of law and of fact that the Social Federal Representation expresses, and because this petition satisfies the requisites stated in the Extradition Treaty, currently in force between our two countries, and also satisfies the requisites established by the International Extradition Act, this Ministry of Foreign Affairs, with basis on part IV of article 15 of its Bylaws, requests your intervention to the effect that procedure of the extradition of the accused may begin. We would appreciate being informed of the steps taken with respect to this request.

As a result, and since the above transcript indicates the events and facts related to the crime of which HECTOR BERRELLEZ or ARTURO E. BERRELLEZ is accused of, provides their description and whereabouts in the United States, promises to formalize the extradition request, declares the existence of a warrant of arrest issued by the competent judicial authority against him, I wish to submit to Your Excellency this information, which I assure is true, and request the provisional detention in reference.

I wish to assure Your Excellency of my personal commitment to formalize the extradition request within the sixty day period, starting from the date on which the provisional detention, for extradition purposes, of the above mentioned person is confirmed. For which reason, I would appreciate being informed, as soon as possible, of the date when the sixty day period mentioned in the Extradition Treaty starts running.

The provisional detention is requested without detriment that by the established conducts in the Treaty it be possible to perfect a different application of the for crimes other than the one which is foundation of this request."

In view of the above, Mr. Secretary, and considering that this petition abides by the terms of the Extradition Treaty currently in force between the United Mexican States and the United States of America, I request your kind intervention in ensuring that the competent U.S. authorities, including the U.S. judicial authorities, take the necessary measures to detain HECTOR BERRELLEZ or ARTURO E. BERRELLEZ for his subsequent extradition, from the United States of America to Mexico.

In thanking Your Excellency in advance for your valuable assistance concerning this request, I take this opportunity to renew to Your Excellency the assurance of my highest and most distinguished consideration.

Gustavo Petricioli
Ambassador

His Excellency
James A. Baker, III
Secretary of State
Washington, D.C.

APPENDIX C-1

Washington, D.C., a 19 de julio de 1990.

Señor Secretario:

En nombre de mi Gobierno, tengo a honra referirme al Tratado de Extradición suscrito entre los Estados Unidos Mexicanos y los Estados Unidos de América, para solicitar formalmente al Gobierno de Vuestra Excelencia, con base en los Articulos 1, 2 y, en particular, con fundamento en el Articulo 11 del citado tratado, la detención provisional con fines de extradición del señor HECTOR BERRELLEZ O ARTURO E. BERRELLEZ a quien las autoridades mexicanas reclaman por su probable responsabilidad en la comisión del delito de privación ilegal de la libertad con carácter de secuestro mismo que encaja dentro de la fracción l del Artículo 2° y el inciso 4) del Apéndice del Tratado de referencia, delito cometido en agravio del C. Doctor Humberto Alvarez Machain, por cuya razón se le sigue la causa penal numero 118/90 ante el Juez Primero de Distrito en Materia Penal en el Estado de Jalisco, de la que resultó orden de aprehensión en contra del reclamado, fechada el 9 de julio de 1990.

Lo anterior lo manifiesto a usted en virtud de la gestión que me encomienda la Secretaria de Relaciones Exteriores del Gobierno Mexicano, mediante el oficio numero 7 5044 de fecha 16 de julio de 1990, cuyo texto, para todos los efectos legales a que haya lugar, el que suscribe, Embajador de Mexico ante los Estados Unidos de América, hace suyo y transcribe en su parte conducente a continuación:

"La Procuraduria General de la República, mediante oficio DAI-666/90, fechado el 13 del mes en curso solicita, con base en los articulos 102 y 119 de la Constitución Politica de los Estados Unidos Mexicanos, en el articulo 11 del Tratado de Extradición celebrado entre nuestro pais y los Estados Unidos de América, y en los articulos 2 fracción VII, 9 fracción 11 de la Ley Orgánica de la Pro-

curaduría General de la República, 4 del Código Penal para el Distrito Federal en Materia del Fuero Común y para toda la República en Materia del Fuero Federal y por ultimo en el articulo 3° de la Ley de Extradición Internacional, que por los conductos diplomáticos se requiera al Gobierno de los Estados Unidos de América, la detención provisional con fines de extradición de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, contra de quienes el Juez Primero de Distrito en Materia Penal en el Estado de Jalisco el 9 del mes y año en curso, en la causa penal número 118/90, libró orden de aprehensión en contra de los reclamados, por su probable responsabilidad en la comisión del delito de privación ilegal de la libertad con carácter de secuestro, ilícito previsto y sancionado en los artículos 366 fracción I, II y V en relación con el precepto 13 fracciones I, IV y V del Código Penal para el Distrito Federal en Materia del Fuero Común y para toda la Repúblicaa en Materia del Fuero Federal.

"La petición se fundamenta básicamente en el artículo II del Tratado invocado, considerándose aplicable asimismo, la fracción I del articulo 2° y el inciso 4) de su Apéndice, ya que el delito imputado a los reclamados es punible en ambos países, con una pena de privación de la libertad mayor de un año.

"La Procuraduría General de la Republica efectúa una relación de hechos delictuosos imputados a los reclamados, quienes se encuentran prófugos de la Justicia Mexicana, en la forma siguiente.

"El 2 de abril de 1990, el C. Doctor Humberto Alvarez Machain, se encontraba en el interior del consultorio médico de su propiedad ubicado en Mexicaltzino 1853, en la ciudad de Guadalajara, Jalisco, cuando minutos después de haber atendido a una paciente de apellido Rodríguez, se presentaron cinco personas que portaban armas, mismas

que detuvieron al citado Alvarez Machain, ostentándose como elementos de cuerpos policiacos, arrancando al mismo tiempo los cables telefónicos.

"Posteriormente, estas personas condujeron al secuestrado por via terrestre al Municipio de Silao, Estado de Guanajuato, y de allí a la ciudad de León en el mismo Estado, para al día siguiente, o sea el 3 de abril de 1990, trasladarlo por vía aérea de esa ciudad a El Paso, Texas, Estados Unidos de América, habiéndose realizado el vuelo a bordo de un avión Turbo Comander, Modelo 810, color café claro con franjas color café obscuro, matriculo XA-PEW de seis plazas, propiedad de la empresa aérea denominada Aerojalisco, quien prestó el servicio solicitado por los secuestradores cubriendo la ruta Guadalajara-León-Ciudad Juárez-Guadalajara, habiéndose introducido, previa autorización de internamiento, a El Paso, Texas, Estados Unidos de América, aterrizando en el aeropuerto de ese lugar.

"Por declaración vertida por el C. Jorge Covarrubias Manrique, ante el Agente del Ministerio Público Federal, el 28 de abril de 1990, reconoció haber participado en el secuestro del Doctor Alvarez Machain, y que el mismo fue un operativo de la Drug Enforcement Administration (D.E.A), ordenado a través de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE por el señor HECTOR BERRELLEZ o ARTURO E. BERRELLEZ.

"Mediante declaración emitida por ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE, ante el Juez del Tribunal de Distrito de los Estados Unidos de América, para el Distrito Central de California, en el caso número CR87422(F)-ER, el 25 de mayo de 1990, declaró que el secuestro de Humberto Alvarez Machain, por él dirigido, fue aprobado por HECTOR BERRELLEZ, quien ante la misma autoridad confirmó este dicho.

"De los hechos antes referidos, se desprende que presuntivamente ANTONIO GARATE BUSTAMANTE o JOSE

ANTONIO GARATE BUSTAMANTE acordó y preparó el secuestro del Doctor Humberto Alvarez Machain, y el 2 de abril de 1990, lo llevó a cabo en la ciudad de Guadalajara, Jalisco, para posteriormente trasladarlo a los Estados Unidos de América, todo ello con la aprobación de HECTOR BERRELLEZ, en su calidad de superior jerárquico dentro de la Drug Enforcement Administration (D.E.A.), por lo que la C. Juez Primero de Distrito en Materia Penal en el Estado de Jalisco, al relacionar éstos con los elementos de convicción aportados por el Ministerio Público Federal en la averiguación de la comisión del delito, consideró que los CC. ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, como probables responsables en la comisión del delito de PRIVACION ILEGAL DE LA LIBERTAD CON CARACTER DE SECUESTRO.

"Se tiene conocimiento de que los reclamados actualmente comparecen en el juicio instruído en contra del secuestrado, ante el Juez del Tribunal de Distrito de los Estados Unidos para el Distrito Central de California, por lo cual, para la localización de éstos, se proporciona como su paradero la ciudad de Los Angeles en ese Estado de California.

"Para efectos de identificación, la Procuraduria General de la República proporciona la media filiación de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMENTE y remite fotocopia simple de su fotografía.

LUGAR DE NACIMIENTO	AGUA CALIENTE, SINALOA, MEXICO
ESTADO CIVIL	CASADO
EDAD	51 AÑOS
FECHA DE NACIMIENTO	28-05-39
CABELLO	INSERCION DEL PELO CIRCULAR ENTRE LACIO Y ABUNDANTE, NEGRO ENTRECANO
FRENTE	GRANDE
OJOS	CAFE
NARIZ	GRANDE, PROFUNDA, RECTILINEA LIBERAMENTE ELEVADA Y BASE HORIZONTAL
BOCA	CHICA CON LABIOS GRUESOS
MENTON	INCLINACION VERTICAL, ALTURA MEDIANA, ANCHURA MEDIANA
OREJAS	CONTORNO DEL LOBULO EN ESCUADRA
TEZ	BLANCA
COMPLEXION	MEDIANA
PESO	78 KILOS APROXIMADAMENTE
ESTATURA	1.73 METROS

Asimismo, proporciona la media filiación de HECTOR BERRELLEZ o ARTURO E. BERRELLEZ:

EDAD APROXIMADA	43 A 45 AÑOS
ESTATURA	1.75 a 1.78 METROS
COMPLEXION	ROBUSTA
CABELLO	ONDULADO, ENTRECANO Y RECORTADO
TEZ	BLANCA
OJOS	CAFE CLARO
PESTAÑAS	RIZADAS
CEJAS	POBLADAS
NARIZ	RECTA
BOCA	REGULAR
CARA	REDONDA
SEÑAS PARTICULARES	EN AMBAS MEJILLAS TIENE CICATRICES DE VIRUELA O ACNE

"Por otra parte y en cumplimiento de lo previsto en el Tratado de Extradición invocado, la Procuraduría General de la República otorga la promesa de formalizar la SOLICITUD DE EXTRADICION de los señores ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, dentro del término establecido por el Instrumento Internacional referido, contado a partir de la fecha en que las autoridades estadounidenses logren su detención, independientemente de aportarse mayores datos personales para su mejor identificación y más pronta localización.

En virtud de las consideraciones de derecho y de hecho que expresa la Representación Social Federal ya invocada, y en razón de que se satisfacen los requisitos del Tratado de Extradición celebrado entre ambos paises y satisface además lo establecido en la Ley de Extradición Internacional; por lo anterior, esta Cancillería con base en la fracción IV, articulo 15 del Reglamento Interior de la misma, solicita su intervención para

efecto de que se inicie el procedimiento de extradición de los requeridos, agradeciendo se nos informe respecto de los avances y gestiones que se efectúen al respecto."

Por lo anterior, toda vez que en el documento que arriba transcribo se expresan actos y hechos relacionados con el delito que se imputa al reclamado, su descripción y su paradero en territorio estadounidense, asi como la promesa de formalizar la solicitud de extradición respectiva y la existencia de una orden de aprehensión librada por autoridad judicial competente en su contra, hechos que me permito presentarlos como veridicos que son ante Vuestra Excelencia, solicito la presente detención provisional.

Hago mía la promesa de formalizar la solicitud de extradición y que dentro del término de sesentas días, a partir de la fecha en que se me confirme la detención provisional de sujeto reclamado, presentaré en sus términos, la solicitud formal correspondiente; por lo que le agradeceré comunicarme, a la brevedad posible, la fecha precisa en que comience a correr el plazo a que se hace mención en el Tratado de referencia.

La detención provisional se solicita sin perjuicio de que por los conductos establecidos en el propio Tratado se pueda perfeccionar solicitud distinta respecto del presunto extraditado por delitos distintos a los que son fundamento de esta solicitud.

Por loarriba se0tnalado, Señor Secretario, al encontrarse la petición que hago, deqntro de los supuestos descritos fpor el Tratado de Extradición vigente entre nuestros dos países, ruego a Usted su amable concurso para obtener de las autoridades estadounidenses competentes en la materia, incluso de las judiciales, el que se tomen las medidas necesarias para obtener la aprehensión, con fines ulteriores de extradición desde los Estados Unidos de América a México, del reclamado HECTOR BERRELLEZ o ARTURO E. BERRELEZ.

Al agradecer a Vuestra Excelencia, anticipadamente, su valioso concurso en la gestión solicitada, hago propicia la ocasión para renovarle las seguridades de mi más alta y distinguida consideración.

Gustavo Petricioli
Embajador

Al Excelentisimo Señor
James A. Baker III,
Secretario de Estado,
Ciudad

Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

No. 91-712

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 25, 1991
CERTIORARI GRANTED JANUARY 10, 1992

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-712

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 87-422-21-ER

JUDGE EDWARD RAFEEDIE

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAFAEL CARO QUINTERO, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
01/31/90	742	Filed indictment (fld sixth indictment. KKG) (Dkt'd 02/13/90).
		* * * * *
02/08/90	769	Filed bench warrant returned unexecuted (Dkt'd 02/14/90).
		* * * * *
04/05/90		Dft arrested in El Paso, TX. LJ (Dkt'd 05/02/90).
04/10/90	950	Arraignment held (Counts 3-4, 6, 7, 8)) Dft is arrn. Dft states true name is Humberto Lvarez-Machain, copy indict givt to Dft. Crt. questions Dft re his physical and mental conditions, and advises Dft of the nature and possible consequences of said plea, Dft waives reading of indict. Indict. read. Dft pleads not guilty cnts 3, 4, 6, 7 & 8. Trial set for 5/1/90 at 9:30 a.m. LJ (J. Churchill) (Judge Rafeedie) (Dkt'd 05/02/90).
		* * * * *

Date	No.	PROCEEDINGS
	950	Defendant enters plea of not guilty (Counts 3-4, 6, 7, 8) (Judge Rafeedie) (Dkt'd 05/02/90).
		* * * * *
04/19/90	976	Status hearing held (status conf—crt and counsel confer. trial to commence as sched. motn Dft Machain on the issue of Jurisd is to be fld and srvd 5/11/90, Govt's response 5/18/90, Dft's reply 5/21/90 and hrg. on the mitn 5/25/90 at 9:30 a.m. motn Dft matta to suppress is cont'd to 5/—/90 at 9:30 a.m. LJ (J. Churchill) (Judge Rafeedie) (Dkt'd 05/02/90).
		* * * * *
05/18/90	1056	Fld Gov't Opp to Dft's motn to dism for outrageous Govt conduct & for lack of jurisdiction of the person & subj matter, declarations, exhs, ret 5/25/90 at 9:30 a.m. EW (Dkt'd 05/23/90).
05/21/90	1057	Fld Dft's reply to Govt's Opp to motn to dism for outrageous Govt conduct & motn to dism for lack of jurisdiction of the person & subj matter (F.R.C.P. 12, et seq), memo of pts & auth, ret 5/25/90 at 9:30 a.m. EW (Dkt'd 05/23/90).
		* * * * *
05/23/90	1068	Fld govt's errata to Govt's Opp to Dft's motn to dism for outrageous govt conduct, ret 5/25/90 at 2 p.m. EW (Dkt's 05/30/90).
	1069	Fld Govt's Supplemental Opp to Dft's motn to dism for outrageous govt conduct, ret 5/25/90 at 2 p.m. EW (Dkt'd 05/30/90).
05/25/90	1084	Status hearing held (Motn Dft Alvarez-Machain to dism for outrageous govt conduct, to dism for lack of jurisdiction, crt. & cnsl conf, motn taken under submission, pty

Date	No.	PROCEEDINGS
		to file supplemental brief & argument as to whether or not the crt has auth to grant relief req, fld wit/exh list. S/JC-EW) (Judge Rafeedie) (Dkt'd 06/05/90).
		* * * * *
05/30/90	1085	Fld Govt's 2nd Supplemental Opp to Dft's motn to dism for outrageous govt conduct. EW (Dkt'd 06/05/90).
	1085	Fld Govt's 2nd Supplemental Opp to Dft's motn to dism for outrageous govt conduct. EW (Dkt'd 06/05/90).
	1086	Fld Dft's Supplemental pts & auth to dism indict. EW (Dkt'd 06/05/90).
	1091	Order filed (Fld ord re: Alvarez-Machain's motn to dism for lack of jurisdiction, it is ord that Dft may have until & incldng 6/04/90, to file a supplemental brief, the govt may then have until & incldng 6/11/90 to file any response to Dft's supplemental brief, this matter will then be taken under submission w/o oral argument, it is fur ord that the govt shall submit to this crt, soon as practicable, any docs indicating that the govt of Mexico has fld an official protest re the abduction of Dft Machain w/the US Govt, the govt shall also submit translated transcriptions of any such docs, it is fur ord that the clk of the crt shall serve, by us mail, cpy of this ord on consl for the pty in this matter. EW) (Judge Rafeedie) Dkt'd 06/07/90).
06/04/90	1097	Fld Dft's verif of exh Fld in supplemental pts & auth to dism indict (5/30/90). ED (Dkt'd 06/08/90).
		* * * * *

Date	No.	PROCEEDINGS
06/08/90	1125	Order filed (fld supplemental ord setting supplemental ord setting supplemental briefing sch on Dft Machain's motn to dism for lack of jurisdiction, it is ord that Dft shal file on or bf 6/13/90 a supplemental brief addressing the issues outlined in the crt's 5/30/90 ord, it is fur ord that the govt shall file on or bf 6/18/90 a supplemental brief addressing the issues outlined in the crt's 5/30/90 ord, these briefs my be redundant of earlier briefs fld in this matter if the pty feel that their earlier briefs cover areas of inquiry outlined in the crt's 5/30/90 ord, the crt's 5/30/90 ord remains in force to the extent that it ord the govt to submit any docs indicating that the govt of Mexico has fld an official protest re the abduction of Dft Machain w/the US Govt & translated transcription of such docs, it is fur ord that the clk of the crt shall serve, by US mail, cpy of this ord on cnsl for the pty in this matter. EW) (Judge Rafeedie) (Dkt'd 06/18/90).
		* * * * *
06/13/90	1130	Fld Dft's 3rd supplemental pts & auth in supp of dft Alvarez-Machain's motn to dism indict for lack of jurisdiction & outrageous govt misconduct. EW (Dkt'd 06/18/90).
06/18/90	1139	Fld gov'ts 3rd Supplemental Opp to Dft's motn to dism for outrageous govt conduct. EW (Dkt'd 06/22/90).
06/19/90	1141	Fld Dft's reply to govt's 3rd Supplemental Opp to Dft Alvarez-Machain's motn to dism indict for lack of jurisdiction & outrageous govt misconduct (rules of crt 7.7). EW (Dkt'd 06/25/90).
		* * * * *

Date	No.	PROCEEDINGS
07/02/90		Fld Dft's supplement to Dft Alvarez-Machain's reply to govt's 3rd Opp to motn to dism indict for lack of jurisdiction & outrageous govt misconduct. EW (Dkt't 07/09/90).
08/06/90	1262	Fld govt's supplemental filing re Dft's motn to dism for outrageous govt conduct. EW (Dkt'd 08/07/90).
08/08/90	1263	Fld Dft's reply to gov't supplemental filing re Dft's motn to dism for outrageous govt conduct. EW (Dkt'd 08/14/90).
08/10/90	1265	Status hearing held (the crt grants Dft's motn to dism, the crt also holds that treaty re expedition had been viol by unlawfully abducting Dft, the crt fur holds that this crt lacks jurisdiction to try Dft & ord Dft discharged forthwith, the govt to ord to repatriate Dft to his own country, the govt req a stay of the ord to discharge Dft forthwith in ord to conf w/the Justice Dept as to any fur action to be taken, the crt grants the req, & the exec of the ord to forthwith discharge is stayed until the govt's position can be ascertained, a stat conf on the matter is set for 8/15/90).
		Dismissed on court's motion (Counts 3-4, 6, 7, 8) (Judge Rafeedie) (Dkt'd 08/15/90).
		Status hearing set for 08/17/90 at 9:00 a.m. (re stat conf. LL-EW) (Judge Rafeedie) (Dkt'd 08/15/90).
	1266	Order filed (fld errata to ord & Opinion. EW) (Judge Rafeedie) (Dkt'd 08/16/90).

* * * * *

Date	No.	PROCEEDINGS
	1279	Filed notice of appeal (Counts 3-4, 6-8) (Appl #8) (fld govt's notc of appeal frm the ord of the Dist Crt ent on 8/10/90 discharging Dft Humberto Alvarez-Machain & ordering his ret to Mexico. EW) (Dkt'd 08/23/90).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50459

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HUMBERTO ALVAREZ-MACHAIN, DEFENDANT-APPELLEE

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
8/17/90	1	Docketed cause and entered appearances of counsel. (case opened on emergency mtn- dc briefing schedule not yet processed) [90-50459] (dmd) [90-50459]
		* * * * *
10/9/90	19	Received Appellant USA in 90-50459's brief in 15 copies 47 pages (Informal: n); orig. + 15 aplt's addendum to brief; 5 excerpts of record, served 10/4/90. (Refer to Promo) [90-50459] (sw) [Entry date 10/11/90] [90-50459]
		* * * * *
10/19/90	22	Filed order (Deputy Clerk: ra) the Government's mtn to file a separately bound addendum to aple's brief is granted. The addendum already recvd shall be filed. [90-50459] (dmd) [90-50459]
		* * * * *

11/13/90	25	Received Peter A. Schey's letter dated 11/12/90 with letter from the Mexican Government for submission to the panel (11/9). (REFER TO MERITS PANEL) (sw) [Entry date 11/14/90] [Edit date 01/14/91] [90-50459]
		* * * * *
11/20/90		Received orig. + 15 copies aple's brief of 6 excerpts of record & orgi. + 15 addendum to aple's brief, served on 11/15/90. (Pending St/Rel Cases; Mtn to file addendum) [90-50459] (sw) [Entry date 11/21/90] [90-50459]
11/23/90	33	Filed aple Humberto Alvarez-Machain's motion for leave to file addendum to aple's brief; Declaration of Paul L. Hoffman in support of mtns for leave to file Amicus Briefs, served on 11/21/90. (Promo) (sw) [Entry date 11/26/90] [90-50459]
		* * * * *
1/11/91	44	Filed original and 15 copies appellee Humberto Alvarez-Machain's 50 pages answering brief and 5 supple excerpts of record, served on 11/15/90. [90-50459] (sw) [Entry date 01/12/91] [90-50459]
1/11/91	45	Filed original and 15 copies USA's 25 pages reply brief (Informal: n), served on 12/7/90. [90-50459] (sw) [Entry date 01/12/91] [90-50459]
		* * * * *
2/28/91	57	The United States appeals the district court's order discharging Humberto Alvarez-Machain and ordering him repatriated to Mexico on the ground the United States violated the extradition treaty between the U.S. and Mexico by unilaterally abducting Alvarez-Machain for the torture/kidnapping/murder of a federal agent.

Date	No.	PROCEEDINGS

ISSUES:

1. Did the dc err in determining the extradition treaty was violated where formal extradition proceedings were not commenced by the U.S., which instead had Alvarez-Machain abducted Mexican police pursuant to an agreement with DEA officials?

2. Did the dc err in determining the Ker-Frisbie doctrine did apply to treaty violations, and thus, Alvarez-Machain could not be prosecuted? See *Ker* v. *Illinois*, 119 U.S. 421 (1886), *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

3. Did the dc err in determining that Mexico vested Alvarez-Machain with derivative standing under the treaty by presenting the U.S. government a diplomatic note that effect?

4. Is the extradition treaty self executing and, therefore, directly enforceable in the dc?

5. Does due process preclude this prosecution because of outrageous government conduct?

NOTES:

*Other issues are raised. The district court is stayed by emergency order of 8/23/90.

*Alvarez-Machain says this case is the same as *U.S.* v. *Ramscher*, 119, U.S. 407 (1886).

*The government claims that 88-5421, 88-5462, and 89-50028 are related appeals. No. 90-5-497; closed cross-appeal.

Date	No.	PROCEEDINGS
		*Alvarez-Machain's statement of related cases was not available at time of Inv.
		*See amicus brief orders of 1/11/91.
		*This case is to be expedited per order of 8/23/90. Atty: D Collins Date: 2/7/91
		[90-50459] (rk) [Entry date 03/01/91] [90-50459]
		* * * * *
4/4/91	65	Argued to Mary M. Schroeder, Alfred T. Goodwin, Samuel P. King; SUBMISSION DEFERRED, for length of time to be mentioned later. Must wait for the decision of "*USA* v. *Verdugo-Urquidez*" which was argued & deferred on 2/4/91. [90-50459] (rmw) [90-50459]
		* * * * *
4/8/91	67	Filed order (Alfred T. Goodwin, Mary M. Schroeder, Samuel P. King) : Submission of this case is deferred pending this court's decision in *United States* v. *Verdugo-Urquidez* or further order of the court. [90-50459] (jw) [90-50459]
		* * * * *
8/8/91	75	Filed order (Alfred T. Goodwin, Mary M. Schroeder, Samuel P. King) : Cnsl shall file within 14 days from the date of this order, supplemental memoranda, note to exceed ten typewritten pages, explaining the effect of *United States* v. *Verdugo-Urquidez*, slip op. 9063 (9th Cir. July 22, 1991), on their position in this case. [90-50459] (ec) [90-50459]

Date	No.	PROCEEDINGS
8/23/91	76	Filed aple's memorandum in response to this Court's order of 8/8/91, served on 8/22/91/ (PANEL) [90-50459] (sw) [Entry date 08/27/91] [90-50459]
8/23/91	78	Filed Appellant USA's supplemental brief in response to the 8/8/91 order, served on 8/22/91. (PANEL) [90-50459] (sw) [Entry date 08/27/91] [90-50459]
		* * * * *
10/15/91	82	Filed order (Alfred T. Goodwin, Mary M. Schroeder, Samuel P. King): This case is hereby resubmitted effective 7/22/91. [90-50459] (sw) [90-50459]
10/18/91	89	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written; Signed, Published. Alfred T. Goodwin, author; Mary M. Schroeder; Samuel P. King). FILED AND ENTERED JUDGMENT. [90-50459] (sw) [Entry date 11/18/91] [90-50459]
10/23/81	85	Filed Appellant USA in 90-50459's motion to stay the mandate pending application for writ of certiorari; Declaration of Steven E. Zipperstein (10/22). (Lead Judge) [90-50459] [90-50459] (sw) [Entry date 10/24/91] [90-50459]
10/30/91	87	Filed order (Alfred T. Goodwin, Mary M. Schroeder, Samuel P. King): Appellant's motion to stay the mandate pending application for writ of certiorari is GRANTED. [90-50459] (sw) [90-50459]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
June 1989 Grand Jury

CR 87-422(F)-ER

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAFAEL CARO-QUINTERO, aka "Rafael", aka "El Grenas", aka "Rafa", ERNESTO FONSECA-CARRILLO, aka "Don Neto", JUAN RAMON MATTA-BALLESTEROS; aka "El Negro", aka "El Colombiano", aka "Negro Jose", MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, JUAN GILBERTO HERNANDEZ-PARRA, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, JAVIER VASQUEZ-VELASCO, ANTONIO VASQUEZ-VELASCO, ANTONIO VASQUEZ-OCHOA, EZEQUIEL GODINEZ-CERVANTES, INES CALDERON-QUINTERO, aka "Rolando Cervantes", ALBINO BAZAN-PADILLA, DEFENDANTS

[18 U.S.C. § 1959: Violent Crimes in Aid of Racketeering; 18 U.S.C. §§ 371, 1959: Conspiracy to Commit Violent Crimes in Aid of Racketeering; 18 U.S.C. § 1201(c): Conspiracy to Kidnap a Federal Agent; 18 U.S.C. § 1201(a)(5): Kidnapping of a Federal Agent; 18 U.S.C. §§ 1111, 1114: Felony Murder of a Federal Agent; 18 U.S.C. § 2: Aiding and Abetting; 18 U.S.C. § 3: Accessory After the Fact]

SIXTH SUPERSEDING INDICTMENT

[Filed Feb. 13, 1990]

The Grand Jury charges:

General Allegations

1. At all times referred to in this Sixth Superseding Indictment, defendants RAFAEL CARO-QUINTERO, aka "Rafael", aka "El Grenas", aka "Rafa", ERNESTO FONSECA-CARRILLO, aka "Don Neto", JUAN RAMON MATTA-BALLESTEROS, aka "El Negro", aka "El Colombiano", aka "Negro Jose", MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, JUAN GILBERTO HERNANDEZ-PARRA, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, JAVIER VASQUEZ-VELASCO, ANTONIO VASQUEZ-OCHOA, EZEQUIEL GODINEZ-CERVANTES, INES CALDERON-QUINTERO, aka "Rolando Cervantes", ALBINO BAZAN-PADILLA, and unindicted co-conspirators Rene Martin Verdugo-Urquidez, Raul Lopez-Alvarez and Jesus Felix-Gutierrez, were members of an international narcotics enterprise based in Guadalajara, Jalisco, Mexico (hereinafter referred to as the "Guadalajara Narcotics Cartel").

2. At all times referred to in this Sixth Superseding Indictment, the Guadalajara Narcotics Cartel engaged in racketeering activity, including, but not limited to, the cultivation, importation and distribution of multi-ton quantities of marijuana in Mexico, the Central District of California, and elsewhere.

3. At all times referred to in this Sixth Superseding Indictment, the Guadalajara Narcotics Cartel also engaged in the importation and distribution of multi-kilogram quantities of cocaine in Mexico, Colombia, Costa Rica, the Central District of California, and elsewhere.

4. At all times referred to in this Sixth Superseding Indictment, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS and MIGUEL ANGEL FELIX-GALLARDO supervised and managed the Guadalajara Narcotics Cartel, and co-conspirator Rene Martin Verdugo-Urquidez was a high level lieutenant of defendant RAFAEL CARO-QUINTERO in said enterprise.

5. At all times referred to in this Sixth Superseding Indictment, defendants RUBEN ZUNO-ARCE, HUMBERTO ALVAREZ-MACHAIN, JAVIER VASQUEZ-VELASCO, ANTONIO VASQUEZ-VELASCO, ANTONIO VASQUEZ-OCHOA and EZEQUIEL GODINEZ-CERVANTES assisted, aided and abetted the Guadalajara Narcotics Cartel.

6. At all times referred to in this Sixth Superseding Indictment, Enrique Camarena-Salazar was a Special Agent employed by the Drug Enforcement Administration (hereinafter "DEA") and assigned to the DEA office in Guadalajara, Jalisco, Mexico.

7. At all times referred to in this Sixth Superseding Indictment, Special Agent Enrique Camarena-Salazar was responsible for investigating the Guadalajara Narcotics Cartel.

8. At all times referred to in this Sixth Superseding Indictment, Alfredo Zavala-Avelar was a pilot who assisted the DEA and Special Agent Enrique Camarena-Salazar in locating marijuana fields in Mexico.

9. At all times referred to in this Sixth Superseding Indictment, John Walker was a United States citizen temporarily residing in Guadalajara, Jalisco, Mexico.

10. At all times referred to in this Sixth Superseding Indictment, Alberto Radelat was a United States permanent resident alien temporarily residing in Guadalajara, Jalisco, Mexico.

11. At all times referred to in this Sixth Superseding Indictment, defendant MANUEL IBARRA-HERRERA was the Director of the Mexican Federal Judicial Police.

12. At all times referred to in this Sixth Superseding Indictment, defendant MIGUEL ALDANA-IBARRA was the Director of Interpol in Mexico.

13. At all times referred to in this Sixth Superseding Indictment, defendant ARMANDO PAVON-REYES was a Comandante with Mexican Federal Judicial Police and asssigned by the Mexican government to head the investigation into the kidnapping and murder of Special Agent Enrique Camarena-Salazar.

14. At all times referred to in this Sixth Superseding Indictment, defendant SERGIO ESPINO-VERDIN, a Comandante with the Directorate of Federal Security in Mexico, worked for the Guadalajara Narcotics Cartel.

15. At all times referred to in this Sixth Superseding Indictment, defendant JUAN JOSE BERNABE-RAMIREZ, a State Judicial Police Officer assigned to the homicide investigation squad in Guadalajara, Jalisco, Mexico, worked for the Guadalajara Narcotics Cartel.

16. At all times referred to in this Sixth Superseding Indictment, co-conspirator Raul Lopez-Alvarez, a State Judicial Police officer assigned to the homicide investigation squad in Guadajalara, Jalisco, Mexico, worked for the Guadalajara Narcotics Cartel.

17. At all times referred to in this Sixth Superseding Indictment, defendant JUAN GILBERTO HERNANDEZ-PARRA, an agent with the Mexican Federal Judicial Police assigned to Guadalajara, Jalisco, Mexico, worked for the Guadalajara Narcotics Cartel.

18. Commencing in 1984, members of the Guadalajara Narcotics Cartel engaged in a series of actions the purpose and intent of which was to retaliate against the DEA, its agents and informants, in Mexico, and to learn the nature and extent of the DEA's knowledge of the membership and operations of the cartel. Such actions included, but were not limited to, the following:

a. On or about September 30, 1984, a confidential informant working for the DEA was shot in Guadalajara, Jalisco, Mexico, by members of the Guadalajara Narcotics Cartel.

b. On or about October 10, 1984, in Guadalajara, Jalisco, Mexico, members of the Guadalajara Narcotics Cartel machine-gunned a DEA automobile assigned to a DEA agent.

c. On or about January 30, 1985, John Walker and Alberto Radelat were murdered by members of the Guadalaraja Narcotics Cartel.

d. On or about February 7, 1985, Special Agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar were kidnapped by members of the Guadalajara Narcotics Cartel.

e. On or about February 7, 1985, Special Agent Enrique Camerena-Salazar was taken to defendant RAFAEL CARO-QUINTERO's residence at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

f. Between on or about February 7, 1985, and February 9, 1985, Special Agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar were tortured, interrogated and murdered.

19. On or about February 7, 1985, defendant JUAN JOSE BERNABE-RAMIREZ, and other named defendants and co-conspirators, were present at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

20. On or about February 9, 1985, defendant RAFAEL CARO-QUINTERO and co-conspirator Rene Martin Verdugo-Urquidez fled Guadalajara, Jalisco, Mexico.

21. On or about March 5, 1985, the bodies of Special Agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar were found together in Zamora, Michoacan, Mexico.

22. On or about March 17, 1985, defendant RAFAEL CARO-QUINTERO fled Mexico to Costa Rica.

23. On or about June 17, 1985, the bodies of John Walker and Alberto Radelat were found together in Guadalajara, Jalisco, Mexico.

COUNT ONE

[18 U.S.C. §§ 1959, 2]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

On or about January 30, 1985, in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JAVIER BARBA-HERNANDEZ, JUAN GILBERTO HERNANDEZ-PARRA, JAVIER VASQUEZ-VELASCO, ANTONIO VASQUEZ-VELASCO, ANTONIO VASQUEZ-OCHOA, EZEQUIEL GODINEZ-CERVANTES, and others known and unknown to the Grand Jury, did aid, abet, counsel, induce, procure, cause and otherwise willfully participate in the murder of John Walker, which offense was committed for the purpose of maintaining and increasing the positions of the aforesaid defendants in an enterprise that engaged in racketeering activity, to wit: individuals associated for the purpose of trafficking in marijuana and cocaine, whose activities affected interstate and foreign commerce. The racketeering activity included, but is not limited to, the following substantive narcotics offenses:

1. From in or about November, 1983, through in or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute multi-ton quantities of marijuana which were being cultivated in marijuana fields in Zacatecas, Mexico.

2. In or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute approximately ten (10) tons of harvested marijuana in Zacatecas, Mexico.

3. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of Califor-

nia and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

4. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

5. In or about November, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute approximately 10,000 tons of marijuana which were being cultivated in marijuana fields in Chihuahua, Mexico.

6. On or about February 5, 1985, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, possessed two (2) tons of marijuana with intent to distribute.

COUNT TWO

[18 U.S.C. §§ 1959, 2]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

On or about January 30, 1985, in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JAVIER BARBA-HERNANDEZ, JUAN GILBERTO HERNANDEZ-PARRA, JAVIER VASQUEZ-VELASCO, ANTONIO VASQUEZ-VELASCO, ANTONIO VASQUEZ-OCHOA, EZEQUIEL GODINEZ-CERVANTES, and others known and unknown to the Grand Jury, did aid, abet, counsel, induce, procure, cause and otherwise willfully participate in the murder of Alberto Radelat, which offense was committed for the purpose of maintaining and increasing the positions of the aforesaid defendants in an enterprise that engaged in racketeering activity, to wit: individuals associated for the purpose of trafficking in marijuana and cocaine, whose activities affected interstate and foreign

commerce. The racketeering activity included, but is not limited to, the following substantive narcotics offenses:

1. From in or about November, 1983, through in or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute multi-ton quantities of marijuana which were being cultivated in marijuana fields in Zacatecas, Mexico.

2. In or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute approximately ten (10) tons of harvested marijuana in Zacatecas, Mexico.

3. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

4. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

5. In or about November, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute approximately 10,000 tons of marijuana which were being cultivated in marijuana fields in Chihuahua, Mexico.

6. On or about February 5, 1985, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, possessed two (2) tons of marijuana with intent to distribute.

COUNT THREE

[18 U.S.C. §§ 371, 1959, 2]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

A. *Objects of the Conspiracy*

Beginning on a date unknown and continuing to on or about February 9, 1985, within Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, JUAN GILBERTO HERNANDEZ-PARRA, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, and co-conspirators Rene Martin Verdugo-Urquidez, Raul Lopez-Alvarez, and others known and unknown to the Grand Jury, unlawfully and knowingly combined, conspired, confederated and agreed to commit an offense against the United States, namely:

> To knowingly and intentionally kidnap, torture, interrogate and murder Special Agent Enrique Camarena-Salazar, in violation of Title 18, United States Code, Section 1959.

B. *Means of the Conspiracy*

The foregoing objects of the conspiracy were accomplished as follows:

1. Defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA,

MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, JUAN GILBERTO HERNANDEZ-PARRA, ARMANDO PAVON-REYES, and others both known and unknown, organized and put into operation a scheme to kidnap and murder Enrique Camarena-Salazar, a Special Agent with the United States Drug Enforcement Administration.

2. Defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, and co-conspirators Rene Martin Verdugo-Urquidez, and Raul Lopez-Alvarez, and other members of the Guadalajara Narcotics Cartel, caused Special Agent Enrique Camarena-Salazar to be kidnapped, held against his will, tortured, interrogated and murdered.

C. *Overt Acts*

The following overt acts, among others, were committed by the defendants and by their co-conspirators in furtherance of the foregoing conspiracy in Guadalajara, Jalisco, Mexico:

1. In or about October, 1984, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, and others, met at a residence of defendant JAVIER BARBA-HERNANDEZ in Guadalajara, Jalisco, Mexico, and discussed the kidnapping of Special Agent Enrique Camarena-Salazar.

2. In or about December, 1984, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CAR-

RILLO, JAVIER BARBA-HERNANDEZ, and others, met at a residence of defendant ERNESTO FONSECA-CARRILLO in Guadalajara, Jalisco, Mexico, and had a discussion concerning Special Agent Enrique Camarena-Salazar.

3. In or about December, 1984, defendant JUAN GILBERTO HERNANDEZ-PARRA, an agent with the Mexican Federal Judicial Police, was present at this meeting at the residence of defendant ERNESTO FONSECA-CARRILLO in Guadalajara, Jalisco, Mexico.

4. In or about the first week of February, 1985, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, RUBEN ZUNO-ARCE and JAVIER BARBA-HERNANDEZ met at a residence of defendant JAVIER BARBA-HERNANDEZ in Guadalajara, Jalisco, Mexico, and discussed the kidnapping and interrogation of Special Agent Enrique Camarena-Salazar.

5. On or about February 7, 1985, Special Agent En-Enrique Camarena-Salazar was abducted by members of the Guardalajara Narcotics Cartel.

6. From on or about February 7, 1985, to February 9, 1985, defendant RAFAEL CARO-QUINTERO, and others, interrogated Special Agent Enrique Camarena-Salazar at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

7. From on or about February 7, 1985, to February 9, 1985, defendant SERGIO ESPINO-VERDIN, a Comandante with the Directorate of Federal Security, and others, interrogated Special Agent Enrique Camarena-Salazar at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

8. On or about February 8, 1985, defendant ERNESTO FONSECA-CARRILLO was present at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

9. On or about Febuary 8, 1985, defendant JUAN JOSE BERNABE-RAMIREZ, a State Judicial Police Officer, was present at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

10. On or about February 8, 1985, defendant HUMBERTO ALVAREZ-MACHAIN was present at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

11. On or about February 8, 1985, co-conspirator Raul Lopez-Alvarez, a State Judicial Police Officer, was present at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

12. On or about February 8, 1985, co-conspirator Rene Martin Verdugo-Urquidez was present at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

13. On or about February 10, 1985, defendant MIGUEL ANGEL FELIZ-GALLARDO possessed at his residence in Guadalajara, Jalisco, Mexico, a photograph of Special Agent Enrique Camarena-Salazar.

COUNT FOUR

[18 U.S.C. §§ 1959, 2]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

On or about February 7, 1985, in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, JUAN GILBERTO HERNANDEZ-PARRA, SERGIO ESPINO-VERDIN, HUMBERTO ALVEREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ and

co-conspirators Rene Martin Verdugo-Urquidez, Raul Lopez-Alvarez, and others known and unknown to the Grand Jury, did aid, abet, counsel, induce, procure, cause and otherwise willfully participate in the kidnapping and murder of Special Agent Enrique Camarena-Salazar, which offenses were committed for the purpose of maintaining and increasing the positions of the aforesaid defendants in an enterprise that engaged in racketeering activity, to wit: individuals associated for the purpose of trafficking in marijuana and cocaine, whose activities affected interstate and foreign commerce. The racketeering activity included, but is not limited to, the following substantive narcotics offenses:

1. From in or about November, 1983, through in or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute multi-ton quantities of marijuana which were being cultivated in marijuana fields in Zacatecas, Mexico.

2. In or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute approximately ten (10) tons of harvested marijuana in Zacatecas, Mexico.

3. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

4. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

5. In or about November, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to dis-

tribute approximately 10,000 tons of marijuana which were being cultivated in marijuana fields in Chihuahua, Mexico.

6. On or about February 5, 1985, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, possessed two (2) tons of marijuana with intent to distribute.

COUNT FIVE

[18 U.S.C. §§ 1959, 2]

The general allegations of this Sixth Superseding Indicement are realleged in this count and incorporated herein by reference.

On or about February 7, 1985, in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, SERGIO ESPINO-VERDIN, JUAN JOSE BERNABE-RAMIREZ and co-spirators Rene Martin Verdugo-Urquidez, Raul Lopez-Alvarez, and others known and unknown to the Grand Jury, did aid, abet, counsel, induce, procure, cause and otherwise willfully participate in the kidnapping and murder of Alfredo Zavala-Avelar, which offenses were committed for the purpose of maintaining and increasing the positions of the aforesaid defendants in an enterprise that engaged in racketeering activity, to wit: individuals associated for the purpose of trafficking in marijuana and cocaine, whose activities affected interstate and foreign commerce. The racketeering activity included, but is not limited to, the following substantive narcotics offenses:

1. From in or about November, 1983, through in or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute multi-ton quantities of marijuana which were being cultivated in marijuana fields in Zacatecas, Mexico.

2. In or about June, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadala-

jara Narcotics Cartel, possessed with intent to distribute approximately ten (10) tons of harvested marijuana in Zacatecas, Mexico.

3. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

4. In or about April, 1984, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, in the Central District of California and elsewhere, possessed with intent to distribute approximately two (2) tons of marijuana.

5. In or about November, 1984, defendant RAFAEL CARO-QUINTERO, and other members of the Guadalajara Narcotics Cartel, possessed with intent to distribute approximately 10,000 tons of marijuana which were being cultivated in marijuana fields in Chihuahua, Mexico.

6. On or about February 5, 1985, co-conspirator Rene Martin Verdugo-Urquidez, and other members of the Guadalajara Narcotics Cartel, possessed two (2) tons of marijuana with intent to distribute.

COUNT SIX

[18 U.S.C. § 1201(c)]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

A. *Objects of the Conspiracy*

Beginning on a date unknown and continuing to on or about February 9, 1985, within Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL

ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, JUAN GILBERTO HERNANDEZ-PARRA, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, and coconspirators Rene Martin Verdugo-Urquidez, Raul Lopez-Alvarez, and others known and unknown to the Grand Jury, unlawfully and knowingly combined, conspired, confederated and agreed to commit an offense against the United States, namely:

> To knowingly and intentionally kidnap and hold for the purpose of interrogation, a Special Agent of the United States Drug Enforcement Administration, on account of the performance of his official duties, in violation of Title 18, United States Code, Sections 1201(a)(5) and 1201(c).

B. *Means of the Conspiracy*

The foregoing objects of the conspiracy were accomplished as follows:

1. Defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, JUAN GILBERTO HERNANDEZ-PARRA, ARMANDO PAVON-REYES, and other members of the Guadalajara Narcotics Cartel, developed a scheme and plan to kidnap, torture and interrogate Enrique Camarena-Salazar, a Special Agent with the United States Drug Enforcement Administration.

2. Defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, and

co-conspirators Rene Martin Verdugo-Urquidez and Raul Lopez-Alvarez and other members of the Guadalajara Narcotics Cartel, caused Special Agent Enrique Camarena-Salazar to be held against his will at 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

C. *Overt Acts*

The following overt acts, among others, were committed by the defendants and by their co-conspirators in furtherance of the foregoing conspiracy in Guadalajara, Jalisco, Mexico:

1. In or about October, 1984, in a meeting at a residence of defendant JAVIER BARBA-HERNANDEZ, in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, and others, discussed the kidnappling of Special Agent Enrique Camarena-Salazar.

2. In or about December, 1984, in a meeting at a residence of defendant ERNESTO FONSECA-CARRILLO in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JAVIER BARBA-HERNANDEZ, and others, had a discussion concerning Special Agent Enrique Camarena-Salazar.

3. In or about December, 1984, defendant JUAN GILBERTO HERNANDEZ-PARRA, an agent with the Mexican Federal Judicial Police, was present at this meeting at defendant ERNESTO FONSECA-CARRILLO's residence in Guadalajara, Jalisco, Mexico.

4. In or about the first week of February, 1985, defendants RAFAEL CARO-QUINTERO, ERNESTO

FONSECA-CARRILLO, RUBEN ZUNO-ARCE and JAVIER BARBA-HERNANDEZ met at a residence of defendant JAVIER-BARBA-HERNANDEZ in Guadalajara, Jalisco, Mexico, and discussed the kidnapping and interrogation of Special Agent Enrique Camarena-Salazar.

5. On or about February 7, 1985, members of the Guadalajara Narcotics Cartel abducted Special Agent Enrique Camarena-Salazar.

6. Between on or about February 7, 1985, and February 9, 1985, defendant RAFAEL CARO-QUINTERO, and others, interrogated Special Agent Enrique Camarena-Salazar.

7. Between on or about February 7, 1985, and February 9, 1985, defendant SERGIO ESPINO VERDIN, a Comandante with the Directorate of Federal Security, and others, interrogated Special Agent Enrique Camarena-Salazar.

8. On or about February 8, 1985, defendant ERNESTO FONSECA-CARRILLO went to 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

9. On or about February 8, 1985, defendant JUAN JOSE BERNABE-RAMIREZ, a State Judicial Police Officer, went to 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

10. On or about February 8, 1985, defendant HUMBERTO ALVAREZ-MACHAIN went to 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

11. On or about February 8, 1985, co-conspirator Rene Martin Verdugo-Urquidez went to 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

12. On or about February 8, 1985, co-conspirator Raul Lopez-Alvarez, a State Judicial Police Officer, went to 881 Lope de Vega in Guadalajara, Jalisco, Mexico.

13. On or about February 10, 1985, defendant MIGUEL ANGEL FELIX-GALLARDO possessed at his residence in Guadalajara, Jalisco, Mexico, a photograph of Special Agent Enrique Camarena-Salazar.

COUNT SEVEN

[18 U.S.C. §§ 1201(a)(5), 2]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

Beginning on a date unknown and continuing to on or about February 9, 1985, in Guadalajara, Jalisco, Mexico, defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, MIGUEL ANGEL FELIX-GALLARDO, MANUEL IBARRA-HERRERA, MIGUEL ALDANA-IBARRA, RUBEN ZUNO-ARCE, JAVIER BARBA-HERNANDEZ, ARMANDO PAVON-REYES, JUAN GILBERTO HERNANDEZ-PARRA, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ, and co-conspirators Rene Martin Verdugo-Urquidez, Raul Lopez-Alvarez, and others known and unknown to the Grand Jury, did aid, abet, counsel, induce, procure, cause and otherwise willfully participate in the abduction and holding for the purpose of interrogation of Enrique Camarena-Salazar, a Special Agent with the Drug Enforcement Administration, such acts having been done while Special Agent Enrique Camarena-Salazar was engaged in, and on account of, the performance of his official duties, in violation of Title 18, United States Code, Sections 1201(a)(5) and 2.

COUNT EIGHT

[18 U.S.C. §§ 1111(a), 1114, 2]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

On or about February 9, 1985, in Guadalajara, Jalisco, Mexico, Enrique Camarena-Salazar, an officer and employee of the Drug Enforcement Administration, was murdered on account of the performance of his official duties as a Special Agent of the Drug Enforcement Administration, said murder having taken place in and during the course of the perpetration of his kidnapping. Defendants RAFAEL CARO-QUINTERO, ERNESTO FONSECA-CARRILLO, JUAN RAMON MATTA-BALLESTEROS, SERGIO ESPINO-VERDIN, HUMBERTO ALVAREZ-MACHAIN, JUAN JOSE BERNABE-RAMIREZ and co-conspirators Rene Martin Verdugo Urquidez, Raul Lopez-Alvarez, and others known and unknown to the Grand Jury, willfully perpetrated the kidnapping and holding for interrogation of Enrique Camarena-Salazar, on account of the performance of his official duties as a Special Agent of the Drug Enforcement Administration, by aiding, abetting, counseling, inducing, procuring, causing and otherwise willfully participating in said kidnapping, in violation of Title 18, United States Code, Sections 1111, 1114, and 2.

COUNT NINE

[18 U.S.C. § 3]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

On or about February 9, 1985, in Guadalajara, Jalisco, Mexico, defendants- MANUEL IBARRA-HERRERA, JUAN JOSE BERNABE RAMIREZ and ARMANDO PAVONE-REYES, and co-conspirator Raul Lopez-Alvarez, knowing that defendant RAFAEL CARO-QUINTERO aided, abetted, counseled, induced, procured, caused and otherwise willfully participated in the kidnapping and murder of Enrique Camarena-Salazar and Alfredo Zavala-Avelar, in violation by defendant RA-

FAEL CARO-QUINTERO of Title 18, United States Code, Sections 1111, 1114, 1202(a)(5), 1959 and 2, did knowingly and willfully receive, comfort and assist defendant RAFAEL CARO-QUINTERO in order to hinder and prevent his apprehension, trial and punishment, in violation by defendants MANUEL IBARRA-HERRERA, JUAN JOSE BERNABE-RAMIREZ and ARMANDO PAVON-REYES and co-conspirator Raul Lopez-Alvarez, of Title 18, United States Code, Section 3.

COUNT TEN

[18 U.S.C. § 3]

The general allegations of this Sixth Superseding Indictment are realleged in this count and incorporated herein by reference.

From in or about February, 1985, through April 4, 1985, in Mexico, Costa Rica and elsewhere, defendants INES CALDERON-QUINTERO and ALBINO BAZAN-PADILLA, knowing that defendant RAFAEL CARO-QUINTERO aided, abetted, counseled, induced, procured, caused and otherwise willfully participated in the kidnapping and murder of Special Agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar in violation by RAFAEL CARO-QUINTERO of Title 18, United States Code, Sections 1111, 1114, 1201(a)(5), 1959 and 2, did knowingly and willfully receive, comfort and assist defendant RAFAEL CARO-QUINTERO in order to hinder and prevent his apprehension, trial and punishment, in violation by defendants INES CALDERON-QUINTERO and ALBINO-BAZAN-PADILLA, of Title 18, United States Code, Section 3.

A TRUE BILL

/s/

Foreperson

/s/ Robert L. Brosio
ROBERT L. BROSIO
United States Attorney

DIPLOMATIC NOTE FROM THE EMBASSY OF MEXICO TO THE STATE DEPARTMENT APRIL 18, 1990

No. 0336

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the State Department and wishes to refer to the recent apprehension in Mexican territory and transfer to El Paso of the Mexican citizen Humberto Alvarez Machain.

According to the information that the Mexican authorities have, there is the assumption that Mr. Alvarez Machain has been kidnapped in Mexico and illegally transferred to the United States territory, with the participation of U.S. authorities.

Due to the above, the Embassy of Mexico, upon specific instructions from its Government, requests to the Department of State a detailed report and the corresponding clarification about the possible participation of U.S. authorities in Mr. Humberto Alvarez Machain's kidnap and transfer to the United States. The Mexican Government is making a scrupulous investigation about this case.

The State Department is obviously aware that if it is proven that these actions were performed with the illegal participation of U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered, since, as it is of your knowledge, it is the exclusive responsibility of the Mexican authorities the fight against drug trafficking and criminal organizations within the Mexican territory.

Due to the seriousness of this case, the Embassy of Mexico will appreciate a prompt answer and avails itself of this opportunity to renew to the Department of State the assurances of its consideration.

Washington, D.C. April 18, 1990.

To the Department of State
Washington, D.C.

No. 0336

La Embajada de Mexico saluda al Departamento de Estado y desea referirse a la reciente detencion en territorio mexicano y traslado a la ciudad de El Paso, del ciudadano mexicano, Dr. Humberto Alvarez Machain.

De acuerdo con la informacion con que cuentan las autoridades mexicanas, existe la presuncion de que el señor Alvarez Machain haya sido secuestrado en Mexico y trasladado ilegalmente a territorio de los Estados Unidos, con participacion de autoridades norteamericanas.

En virtud de lo anterior, la Embajada de Mexico, por instrucciones expresas de su Gobierno, solicita al Departamento de Estado un informe detallado y las explicaciones pertinentes sobre la posible participacion de autoridades norteamericanas en el secuestro y traslado a Estados Unidos del señor Alvarez Machain. Por su parte, el Gobierno de Mexico esta llevando a cabo una minuciosa investigacion sobre este caso.

No escapara al reconocido buen criterio del Departamento de Estado que, de comprobarse la participacion ilegal de autoridades norteamericanas en estos hechos, se pone en peligro la cooperacion binacional en la lucha contra el narcotrafico, pues como es de su conocimiento, corresponde exclusivamente a las autoridades mexicanas la responsabilidad del combate al narcotrafico y a las organizaciones criminales dentro del territorio de Mexico.

Al agredecer al Departamento de Estado una pronta respuesta en virtud de la seriedad de estos hechos, la Embajada de Mexico aprovecha la ocasion para reiterarle las seguridades de su consideracion.

Washington, D.C., 18 de abril de 1990.

Al Departmento de Estado
Washington, D.C.

DIPLOMATIC NOTE FROM THE EMBASSY OF MEXICO TO THE STATE DEPARTMENT MAY 16, 1990

UNOFFICIAL TRANSLATION

The Embassy of Mexico presents its compliments to the State Department and wishes to refer to the apprehension in Mexican territory and the illegal transfer to the United States of Dr. Humberto Alvarez Machain.

The Government of Mexico considers the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries.

Accordingly, the procedure followed by the kidnappers and transporters of Dr. Alvarez Machain, was in violation of articles 14 and 16 of the Political Constitution of the United Mexican States, which establishes the right of due process and the equal protection under the law in connection with criminal matters. None of those constitutional rights were observed by the kidnappers and transporters.

As a consequence of those violations, which violate both the mexican Constitutional Law, as well as International Law, the corresponding Mexican authorities have already initiated a criminal action proceedings in accordance with mexican law, against the intellectual and material perpetuators of the illegal kidnapping and transfer to the United States of Dr. Humberto Alvarez Machain, because it is deemed that in such a case, the crimes of kidnapping, false imprisonment and criminal association were committed. In due time, the Mexican Government will request from the Government of the United States of America the extradition of the individuals involved in the perpetration of those crimes, if they could be found in territory of the United States of America, in accordance

with the terms of the existing Extradition Treaty in both Countries.

The Embassy of Mexico, upon specific instructions from its Government, requests to the Department of State its intervention before the corresponding authorities so that Dr. Humberto Alvarez Machain be returned back to Mexico in order to be investigated regarding his probable participation in the crimes whose investigation and prosecution correspond to the Mexican Government. The Mexican Government respectfully requests the collaboration of the Government of the United States of America in order that such individual be tried and sentenced in Mexico with absolute respect to the mexican laws in connection with the crimes in which Dr. Alvarez Machain has participated.

The Embassy of Mexico avails this opportunity to renew to the Department of States the assurances of its consideration.

Washington, D.C., May 16, 1990.

No. 0419

La Embajada de México saluda atentamente al Departamento de Estado y se permite hacer referencia al secuestro en territorio mexicano y traslado ilegal a Los Estados Unidos del Dr. Humberto Alvarez Machain.

El gobierno de México considera que el secuestro y traslado de territorio mexicano al de los Estados Unidos de América del Dr. Alvarez Machain, se realizó con el conocimiento de algunas personas al servicio del gobierno de los Estados Unidos y en contravención al procedimiento establecido en el Tratado de Extradición vigente entre ambos países.

De la misma manera el procedimiento seguido por los captores y trasladantes del Dr. Alvarez Machain, fué violatorio de los artículos 14 y 16 de la Constitución Política de los Estados Unidos Mexicanos, que son los que establecen las guarantías de debido procedimiento legal para las detenciones y de la audiencia en los procesos de carácter penal. Ni una ni otra de tales garantías fué respetada por los captores y trasladantes.

Como consecuencia de estas violaciones, que afectan tanto al derecho constitucional mexicano como al derecho internacional, las autoridades mexicanas competentes ya han iniciado los procedimientos penales que en México deben llevarse a efecto, contra los autores intelectuales y materiales del secuestro y traslado ilegal a los Estados Unidos del Dr. Humberto Alvarez Machain, ya que se considera que en el caso se han dado los delitos de privacíon ilegal de la libertad en forma de secuestro y asociación delictuosa, y en su oportunidad el gobierno mexicano solicitará al gobierno de los Estados Unidos de América la extradición de las personas involucradas en la comisión de dichos delitos y que se encuentren en territorio de los Estados Unidos de América, conforme al Tratado de Extradición vigente entre ambos países.

En consecuencia, la Embajada de México siguiendo instrucciones precisas de su gobierno, solicita al Depart-

mento de Estado su intervención ante las autoridades competentes, a efecto de que sea devuelto el Dr. Humberto Alvarez Machain, para que se someta a la investigación sobre su posible participación en delitos cuya investigación y persecución corresponden al gobierno mexicano, por lo que se exhorta respetuosamente al gobierno norteamericano para que preste su colaboración, para que dicho individuo sea juzgado y sentenciado con respeto absoluto a las leyes mexicanas, respecto de aquellos delitos en los que haya participado el citado Dr. Alvarez Machain.

La Embajada de México aprovecha la oportunidad para renovar al Departamento de Estado, las seguridades de su más atenta consideración.

Washington, D.C. 16 de mayo de 1990.

Al Departmento de Estado
Washington, D.C.

REQUEST OF THE UNITED MEXICAN STATES TO THE UNITED STATES FOR THE PROVISIONAL DETENTION OF ANTONIO GARATE BUSTAMANTE

UNOFFICIAL TRANSLATION

July 19, 1990
Washington, D.C.

Excellency:

On behalf of my Government, I have the honor of referring to the Extradition Treaty between the United Mexican States and the United States of America, in order to inform Your Excellency's Government that Mexican authorities request the provisional detention, for extradition purposes, of ANTONIO GARATE BUSTAMANTE, according to Articles 1 and 2, and especially Article 11, of the above Treaty. The reason for this request is that the above mentioned person is probably responsible for the crime Illegal Deprivation of Liberty in its Modelity of kidnapping. This crime fits into part 1 of the 2nd Article and the subparagraph number 4 of the Appendix to the Treaty. This crime was committed against Doctor Humberto Alvarez Machain for which reason criminal proceedings were filed against ANTONIO GARATE BUSTAMENTE or JOSE ANTONIO GARATE BUSTAMANTE which resulted in Penal Action 118/90 before the First Criminal Judge of the Federal District in the State of Jelisco, and a warrant of arrest issued on July 9, 1990.

The above detention is requested following the request to the Embassy by the Mexican Secretariat of Foreign Relations in its official letter 75044, dated July 16, 1990. The pertinent sections of said note are transcribed below by the undersigned—the Ambassador of Mexico to the United States of America—as if they were his own writing, for whatever legal purposes they may be needed:

His Excellency
James A. Baker, III
Secretary of State
Washington, D.C.

The Office of the Attorney General of Mexico sent note DA1/666/90, dated July 13, 1990, with basis on the Articles 102 and 119 of the Political Constitution of the United Mexican States, Article 11 of the Extradition Treaty currently in force between the United Mexican States and the United States of America, and on Article 2, part VII, Article 9, part II, of the Internal Regulations of the Mexican Office of the Attorney General, Article 4 of the Penal Code for the Federal District in Common Law Matters and for the Republic in Federal Law Matters, and lastly in the 3rd Article of the International Extradition Act, requesting that, through diplomatic conducts, solicits the provisional detention, for extradition purposes, of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ. The First Criminal Judge of the Federal District in the State of Jalisco ordered the apprehension of these men on July 9, 1990 according to the Penal Action number 118/90, for their probable responsibility in the crime of kidnapping. The crime is sanctioned by the Articles 336, parts I, II, and V in relation to the stipulation 13, parts I, IV, and V of the Penal Code for the Federal District in Common Law Matters and for the Republic in Federal Law Matters.

The request is based fundamentally on Article 11 of the Treaty in mention, considering also pertinent part I of Article 2 and the subparagraph number 4 of the Appendix. The crime mentioned above is of a serious nature since it is punishable in both countries with the total loss of freedom for more than one year.

The Office of the Attorney General of Mexico has named the delinquent acts of the accused who are now found to be avoiding the Mexican Justice in the following way:

On April 2, 1990, Doctor Humberto Alvarez Machain was in his medical consulting room situated in 1853 Mexicaltzingo, in the city of Guadalajara, Jalisco. Shortly after he had seen one of his patients, with the surname

of Rodriguez, five men came into his office holding guns. These men who passed themselves as police agents, detained Alvarez Machain while at the same time disconnecting the telephone cables.

Immediately after, the accused drove the victim to Silao, Guanajuato, and from there they drove to the city of Leon of the same state so as to depart by airplane the next day, April 3, 1990, to El Paso, Texas, United States of America. The airplane used, which was brown with stripes of a darker brown, was a Turbo Commander, Model 810, with registration number XA-PEW, for 6 people, and was property of an agency denominated Aerojalisco. The plane was hired out to the kidnappers who followed the route Guadalajara-Leon-Cuidad Juarez-Guadalajara. Previous authorization for landing at the airport had been granted and the accused landed at the airport of El Paso, Texas, United States of America.

On April 28, 1990, Jorge Covarrubias Manrique, before the Agent of the Public Federal Ministry, admitted to having participated in the kidnapping of Doctor Alvarez Machain. He also admitted to have been an operative team member of the Drug Enforcement Administration (D.E.A.), ordered through ANTONIO GARATE BUSTAMENTE or JOSE ANTONIO GARATE BUSTAMANTE by HECTOR BERRELLEZ or ARTURO E. BERRELLEZ.

In the declaration presented by ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE, before the Tribunal Judge of the District of the United States of America, in the case number CR87422(F)-ER, on May 25, 1990, he declared that the kidnapping of Humberto Alvarez Machain was approved by HECTOR BERRELLEZ, who admitted to this before the same authority.

From the above mentioned facts, it is presumed that ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE prepared the kidnapping of Doctor Humberto Alvarez Machain, which took

place on April 2, 1990 in the city of Guadalajara, Jalisco, in order to later transfer him to the United States of America. It is also presumed, according to testimony, that he did it under the approval of HECTOR BERRELLEZ who was superior to him in rank at the Drug Enforcement Administration (D.E.A.). For these reasons, the First Criminal Judge of the District in Penal Matters for the State of Jalisco, after relating these events with the elements of conviction reached by the Public Federal Ministry in the verification of the crime, considered that ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ responsible for the illicit crime of ILLEGAL DEPRIVATION OF LIBERTY IN ITS MODALITY OF KIDNAPPING.

It is known that the above mentioned persons have been summoned for the judgment instituted against the victim, before the tribunal Judge of the District of the United States for the Central District of California. Therefore, for the localization of the above mentioned persons, we inform you that they are currently residing in, or around, Los Angeles, California.

For the purpose of identification, the Office of the Attorney General of Mexico proportions the following information of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and annexes a photocopy of his photograph.

PLACE OF BIRTH:	AGUA CALIENTE, SINALOA, MEXICO
MARITAL STATUS:	MARRIED
AGE:	51 YEARS OLD
DATE OF BIRTH:	MAY 28, 1939
HAIR:	INSERTION OF CIRCULAR HAIR BETWEEN STRAIGHT AND ABUNDANT, GREYING BLACK
FOREHEAD:	LARGE
EYES:	BROWN
NOSE:	LARGE, DEEP, STRAIGHT, SLIGHTLY ELEVATED AND HORIZONTAL BASE

MOUTH:	SMALL WITH LARGE LIPS
CHIN:	VERTICAL INCLINATION, MEDIUM HEIGHT, MEDIUM WIDTH
EARS:	CONTOUR OF LOBE AT RIGHT ANGLE
COMPLEXION:	WHITE
BODY STRUCTURE:	MEDIUM
WEIGHT:	APPROXIMATELY 78 KILOS
HEIGHT:	1.73 METERS

The following information of HECTOR BERRELLEZ or ARTURO E. BERRELLEZ is also mentioned:

APPROXIMATE AGE:	43 TO 45 YEARS OLD
HEIGHT:	1.75 TO 1.78 METERS
BODY STRUCTURE:	ROBUST
HAIR:	CURLY, GREYING, AND SHORT
COMPLEXION:	WHITE
EYES:	LIGHT BROWN
EYELASHES:	CURLY
EYEBROWS:	ABUNDANT
NOSE:	STRAIGHT
MOUTH:	REGULAR
FACE:	ROUND
PARTICULAR SIGNS:	ON BOTH CHEEKS HE HAS SCARS FROM SMALLPOX OR ACNE.

The request for provisional detention is based on what is established by the Extradition Treaty, and therefore, the Office of the Attorney General of Mexico grants the promise of formalizing the application for extradition of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ, within the time limit established by the Treaty in reference and will start running when United States authorities succeed in apprehension, during which lapse we will continue to send personal data for better identification and faster localization.

In view of the considerations of law and of facts that the Social Federal Representation expresses, and because this petition satisfies the requisites stated in the Extradition Treaty, currently in force between our two countries, and also satisfies the established by the International Ex-

tradition Act, this Ministry of Foreign Affairs, with basis on part IV of article 15 of its Bylaws, requests your intervention to the effect that procedure of the extradition of the accused may begin. We would appreciate being informed of any advances made on this request.

The accused is a Mexican citizen.

As a result, and since the above transcript indicates the events and facts related to the crime of which ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE is accused of, provides their description and whereabouts in the United States, promises to formalize the extradition request, declares the existence of a warrant of arrest issued by the competent judicial authority against him, I wish to submit to Your Excellency this information, which I assure is true, and request the provisional detention in reference.

I wish to assure Your Excellency of my personal commitment to formalize the extradition request within the sixty day period, starting from the date on which the provisional detention, for extradition purposes, of the above mentioned person is confirmed. For which reason, I would appreciate being informed, as soon as possible, of the date when the sixty day period mentioned in the Extradition Treaty starts running.

The provisional detention is requested without detriment that by the established conducts in the Treaty it be possible to perfect a different application of the for crimes other than the one which is foundation of this request.

In view of the above, Mr. Secretary, and considering that this petition abides by the terms of the Extradition Treaty currently in force between the United Mexican States and the United States of America, I request your kind meditation in ensuring that these competent U.S. authorities, including the U.S. judicial authorities, take the necessary measures to detain ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE for his subsequent extradition, from the United States of America to Mexico.

In thanking Your Excellency in advance for your valuable assistance concerning this request, I take this opportunity to renew to Your Excellency the assurance of my highest and most distinguished consideration.

GUSTAVO PETRICIOLI
Ambassador

[SEAL]

Washington, D.C., a 19 de julio de 1990.

Señor Secretario

En nombre de mi Gobierno, tengo a honra referirme al Tratado de Extradicion suscrito entre los Estados Unidos Mexicanos y los Estados Unidos de America, para solicitar formalmente al Gobierno de Vuestra Excelencia con base en los Articulos 1, 2 y, en particular, con fundamento en el Articulo 11 cel citago tratado, la detencion provisional con fines de extradicion del señor ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE a quien los autoridades mexicanas reclaman por su probable responsabilidad en la comision del delito de privacion ilegal de la libertad con caracter de secuestro mismo que encaja dentro de la fraccion del Articulo 2° y el inciso 4) de Apendice del Tratado de referencia, delito cometido en agravio del C Doctor Humberto Alvarez Machain, por cuya razon sele sigue la causa penal numero 118/90 ante el Juez Primero de Distrito en Materia Penal en el Estado de Jalisco, de la que resulto orden de aprehension en contra del reclamado, fechada el 9 de julio de 1990.

Lo anterior lo manifésto a usted en virtud de la gestion que me ecomiende la Secretaria de Relacions Exteriores del Gobierno, Mexicano, mediante el oficio numero 75044 de fecha 16 de julio de 1990, cuyo texto, para todos los efectos legales a que haya lugar, el que suscribe, Embajador de Mexico ante los Estados Unidos de America, hace suyo y transcribe en su parte conducente a continuacion.

"La Procuraduria General de la República, mediante oficio DAI-666/90, fechado el 13 del mes curso solicita, con base en los articulos 102 y 119 de la Constitución Politica de los Estados Unidos Mexicanos, en el articulo 11 del Tratado de Extradición celebrado entre nuestro pais y los Estados Unidos de América, y en los articulos 2 fracción VII, 9 fracción 11 de la Ley Organica de la Procuraduria General de la Republica, 4 del Codigo Penal

para el Distrito Federal en Materia del Fuero Comun y para toda la Republica en Materia del Fuero Federal y por ultimo en el articulo 3° de la Yey de Extradicion Internacional, que por los conductos diplomaticos se regulera al Gobierno de los Estados Unidos de America, la detencion provisional con fines de extradicion de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO BERRELLEZ, contra de quienes el Juez Primero de Distrito en Material Penal en el Estado de Jalisco el 9 del mes y año en curso, en la causa penal numero 118/90, libro orden de aprehension en contra de los reclamados, por su probable responsabilidad en la comision del delito de privacion ilegal de la libertad con caracter de secuestro ilicito previsto y sancionado en los articulos 366 fraccion I, II y V en relacion con el precepto 13 fracciones I, IV y V del Codigo Penal para el Distrito Federal en Materia del Fuero Comun y para toda la Republica en Materia del Fuero Federal.

"La peticion se fundamenta basicamente en el articulo II del Tratado invocado, considerandose aplicable asimismo, la fraccion I del articulo 2° y el inciso 4) de su Apendice, ya que el delito imputado a los reclamados es punible en ambos paises, con una pena de privacion de la libertad mayor de un año.

"La Procuraduria General de la Republica efectua una relacion de hechos delictuosos imputados a los reclamados, quienes se ensuentran profugos de la Justicia Mexicana, en la forma sigulente.

"El 2 de abril de 1990, el C Doctor Humberto Alvarez Machain, se encontraba en el interior del consultorio medico de su propiedad ubic. do en Mexicaltzingo 1853, en la cuidad de Guadalajara, Jalisco, cuando minutos despues de haber atendido a una paciente de aselido Rodriguez, se presentaron cinco personas que portaban armas, mismas que detuvieron al citado Alvarez Machain, ostentandose como elementos de cuerpos policiacos, arrancando al mismo tiempo los cables telefonicos.

"Posteriormente, estas personas condujeron al secuestrado por via terrestre al Municipio de Silao, Estado de Guanajuato, y de alii a la ciudad de León en el mismo Estado, para al día siguiente, o sea el 3 de abril de 1990, trasladarlo por vía aérea de esa ciudad a El Paso, Texas, Estados Unidos de America, habiendose realizado el vuelo a bordo de un avión Turbo Comander, Modelo 810, color café claro con franjas color café obscuro, matriculo XA-PEW de seis plazas, propiedad de la empresa aérea denominada Aerojalisco, quien prestó el servicio solicitado por los secuestradores cubriendo la ruta guadalajara-León-Ciudad Juarez-Guadalajara, habiendose introducido, previn autorización de internamiento, a El Paso, Texas, Estados Unidos de America, aterrizando en el aeropuerto de ese lugar.

"Por declaración vertida por el C. Jorge Covarrubias Manrique, ante el Agente del Ministerio Público Federal, el 28 de abril de 1990, reconocio haber participado en el sequestro del Doctor Alvarez Machain, y que el mismo fue un operativo de la Drug Enforcement Administration (D.E.A.), ordenado a través de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE por el señor HECTOR BERRELLEZ o ARTURO E. BERRELLEZ.

"Mediante declaracion emitida por ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE, ante el Juez del Tribunal de Distrito de los Estados Unidos de America, para el Distrito Central de California, en el caso numero CR87422(F)-ER, el 25 de mayo de 1990, declaro que el secuestro de Humberto Alvarez Machain, por el dirigido, fue aprobado por HECTOR BERRELLEZ, quien ante la misma autoridad confirmed este dicho.

"De los hechos antes referidos, se desprende que presuntivamente ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE acordo y preparo el secuestro del Doctor Humberto Alvarez Machain, y el 2 de abril de 1990, lo llevo a cabo en la ciudad de

Guadalajara, Jalisco, para posteriormente trasladario a los Estados Unidos de America, todo ello con la aprobacion de HECTOR BERRELLEZ, en su calidad de superior jerarquico dentro de la Drug Enforcement Administration (D.E.A.), por lo que la C Juez Primero de Distrito en Materia Penal en el Estados de Jalisco, al relacionar estos con los elementos de conviccion aportados por el Ministerio Publico Federal en la averiguacion de la comision del delito, considero que los CC ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, como probables responsables en la comision del delito de PRIVACION ILEGAL DE LA LIBERTAD CON CARACTER DE SECUESTRO.

"Se tiene conocimiento de que los reclamados actualmente comparecer en el juicio instruido en contra del secuestrado, ante el Juez del Tribunal de Distrio de los Estados Unidos para el Distrito Central de California, por lo cual, para la localizacion de estos, se proporciona como su paradero la cludad de Los Angeles en ese Estado de California.

"Para efectos de identificacion, la Procuraduria General de la Republica proporciona la media filiacion de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y remite fotocopia simple de su fotografia.

LUGAR DE NACIMIENTO	AGUA CALIENTE, SINALOA, MEXICO
ESTADO CIVIL	CASADO
EDAD	51 AÑOS
FECHA DE NACIMIENTO	28-05-39
CABELLO	INSERCION DEL PELO CIRCULAR ENTRE LACIO Y ABUNDANTE, NEGRO ENTRECANO
FRENTE	GRANDE
OJOS	CAFE
NARIZ	GRANDE, PROFUNDA, RECTILINEA LIBERAMENTE ELEVADA Y BASE HORIZONTAL
BOCA	CHICA CON LABIOS GRUESOS

MENTON	INCLINACION VERTICAL, ALTURA MEDIANA, ANCHURA MEDIANA
OREJAS	CONTORNO DEL LOBULO EN ESCUADRA
TEZ	BLANCA
COMPLEXION	MEDIANA
PESO	78 KILOS APROXIMADAMENTE
ESTATURA	1.73 METROS

Asimismo, proporciona la media filiación de HECTOR BERRELLEZ o ARTURO E. BERRELLEZ:

EDAD APPROXIMADA	43 A 45 AÑOS
ESTATURA	1.76 a 1.78 METROS
COMPLEXION	ROBUSTA
CABELLO	ONDULADO, ENTRECANO Y RECORTADO
TEZ	BLANCA
OJOS	CAFE CLARO
PESTAÑAS	RIZADAS
CEJAS	POBLADAS
NARIZ	RECTA
BOCA	REGULAR
CARA	REDONDA
SEÑAS PARTICULARES	EN AMBAS MEJILLAS TIENE CICATRICES DE VIRUELA O ACNE

"Por otra parte y en cumplimiento de lo previsto en la Tratado de Extradicion invocado, la Procuradura General de la Republica otorga la promesa de formalizar la SOLICITUD DE EXTRADICION de los señores ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BERRELLEZ o ARTURO E. BERRELLEZ dentro del termino establecido por el Instrumento Internacional referido, contado a partir de la fecha en que las autoridades estadounidenses logren su detención, independientemente de aportarse mayores datos personales para su mejor identificacion y más pronta localizacion.

En virtud de las consideraciones de derecho y de hecho que expresa la Representación Social Federal ya invocada, y en razón de que se satisfacen los requistos del Tratado de Extradicion celebrado entre ampos paises y satisface ade-

mas establecido en la Ley de Extradición Internacional por lo anterior, esta Cancilleria con base en la fraccion IV, articulo 15 del Reglamento interior de la misma, solicita su intervencion para efecto de que se inicie el procedimiento de extradición de los requeridos, agradeciendo se nos informe respecto de los avances y gestiones que se efectuen al respecto."

El reclamado es ciudadano mexicano.

Por lo anterior, toda vez que en el documento que arriba transcribo se expresan actos y hechos relacionados con el delito que se imputa al reclamado, su descripcion y su paredero en territorio estadounidense, asi como la promesa de formalizar la solicitud de extradición respectiva y la existencia de una orden de aprehensión librada por autoricad judicial competente en su contra, hechos que me permito presentarios como veridicos que son ante Vuestra Excelencia, solicito la presente detención provisional.

Hago mia la promesa de formalizar la solicitud de extradicion y que dentro del termino de sesentas dias, a partir de la fecha en que se me confirme la detención provisional del sujeto reclamado, presentaré en sus terminas, la solicitud formal correspondiénte; por lo que le agradecere communicarme, a la brevetad posible, la fecha precisa en que comience a correr el plazo a que se hace mención en el Tratado de referencia.

La detención provisional se solicita sin perjuicio de que por los conductos establecidos en el propio Tratado se pueda perfeccionar solicitud distinta respecto del presunto extraditado por delitos distintos a los que son fundamento de esta solicitud.

Por loarriba señalado, Señor Secretario, al encontrarse la peticion que hago, dentro de los supuestos descritos por el Tratado de Extradicion vigente entre nuestros dos paises, ruego a Usted su amable concurso para obtener de la autoridades estadounidenses competentes en la materia, incluso de las judiciales, el que se tomen las medidas

necesarias para obtener la aprehension confines ulteriores de extradición desde los Estados Unidos de America a México, del reclamado ANTONIO GARATE o JOSE ANTONIO GARATE BUSTAMANTE.

Al agradecer a Vuestra Excelencia, anticipadamente, su valioso concurso en la gestión solicitada, hago propicia la ocasión para renovarle las seguridades de mi más alta y distinguida consideración.

/s/ Gustavo Petricioli
GUSTAVO PETRICIOLI
Embajador

REQUEST OF THE UNITED MEXICAN STATES TO THE UNITED STATES FOR THE PROVISIONAL DETENTION OF HECTOR BERRELLEZ

UNOFFICIAL TRANSLATION

July 19, 1990
Washington, D.C.

Excellency:

On behalf of my Government, I have the honor of referring to the Extradition Treaty between the United Mexican States and the United States of America, in order to inform Your Excellency's Government that Mexican authorities request the provisional detention, for extradition purposes, of HECTOR BERRELLEZ or ARTURO E. BERRELLEZ, according to Articles 1 and 2, and especially Article 11, of the above Treaty. The reason for this request is that the above mentioned person is probably responsible for the crime illegal Deprivation of Liberty in its Modality of kidnapping. This crime fits into part 1 of the 2nd Article and the subparagraph number 4 of the Appendix to the Treaty. This crime was committed against Doctor Humberto Alvarez Machain for which reason criminal proceedings were filled against HECTOR BERRELLEZ or ARTURO E. BERRELLEZ which resulted in Penal Act 118/90 before the First Criminal Judge of the Federal District in the State of Jalisco, and a warrant of arrest issued on July 9, 1990.

The above detention is requested following the request to the Embassy by the Mexican Secretariat of Foreign Relations in its official letter 7 5004, dated July 16, 1990. The pertinent sections of said note are transcribed below by the undersigned—the Ambassador of Mexico to the United States of America—, as if they were his own writing, for whatever legal purposes they may be needed:

His Excellency
James A. Baker, III
Secretary of State
Washington, D.C.

. . . The Office of the Attorney General of Mexico sent note DAI/666/90, dated July 13, 1990, with basis on the Articles 102 and 119 of the Political Constitution of the United Mexican States, Article 11 of the Extradition Treaty currently in force between the United Mexican States and the United States of America, and on Article 2, part VII, Article 9, part II, of the Internal Regulations of the Mexican Office of the Attorney General, Article 4 of the Penal Code for the Federal District in Common Law Matters and for the Republic in Federal Law Matters, and lastly in the 3rd Article of the International Extradition Act, requesting that, through diplomatic conducts, solicits the provisional detention, for extradition purposes, of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ. The First Criminal Judge of the Federal District in the States of Jalisco ordered the apprehension of these men on July 9, 1990 according to the Penal Action number 118/90, for their probable responsibility in the crime of kidnapping. The crime is sanctioned by the Articles 336, parts I, II, and V in relation to the stipulation 13, parts I, IV and V of the Penal Code for the Federal District in Common Law Matters and for the Republic in Federal Law Matters.

The request is based fundamentally on Article 11 of the Treaty in mention, considering also pertinent part I of Article 2 and the subparagraph number 4 of the Appendix. The crime mentioned above is of a serious nature since it is punishable in both countries with the total loss of freedom for more than one year.

The Office of the Attorney General of Mexico has named the delinquent acts of the accused who are now found to be avoiding the Mexican Justice in the following way:

On April 2, 1990, Doctor Humberto Alvarez Machain was in his medical consulting room situated in 1863 Mexicaltzingo, in the city of Guadalajara, Jalisco. Shortly after he had seen one of his patients, with the surname of Rodriguez, five men came into his office holding guns.

These men who passed themselves as police agents, detained Alvarez Machain while at the same time disconnecting the telephone cables.

Immediately after, the accused drove the victim to Silao, Guanajuato, and from there they drove to the city of Leon of the same state so as to depart by airplane the next day, April 3, 1990, to El Paso, Texas, United States of America. The airplane used, which was brown with stripes of a darker brown, was a Turbo Commander, Model 810, with registration number XA-PEW, for 6 people, and was property of an agency denominated Aerojalisco. The plane was hired out to the kidnappers who followed the route Guadalajara—Leon—Ciudad Juarez—Guadalajara. Previous authorization for landing at the airport had been granted and the accused landed at the airport of El Paso, Texas, United States of America.

On April 28, 1990, Jorge Covarrubias Manrique, before the Agent of the Public Federal Ministry, admitted to having participated in the kidnapping of Doctor Alvarez Machain. He also admitted to have been an operative team member of the Drug Enforcement Administration (D.E.A.), ordered through ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE by HECTOR BERRELLEZ or ARTURO E. BERRELLEZ.

In the declaration presented by ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE, before the Tribunal Judge of the District of the United States of America, in the case number CR87422(F)-ER, on May 25, 1990, he declared that the kidnapping of Humberto Alvarez Machain was approved by HECTOR BERRELLEZ, who admitted to this before the same authority.

From the above mentioned facts, it is presumed that ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE prepared the kidnapping of Doctor Humberto Alvarez Machain, which took

place on April 2, 1990 in the city of Guadalajara, Jalisco, in order to later transfer him to the United States of America. It is also presumed, according to testimony, that he did it under the approval of HECTOR BERRELLEZ who was superior to him in rank at the Drug Enforcement Administration (D.E.A.). For these reasons, the First Criminal Judge of the District in Penal Matters for the State of Jalisco, after relating these events with the elements of conviction reached by the Public Federal Ministry in the verification of the crime, considered that ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ responsible for the illicit crime of ILLEGAL DEPRIVATION OF LIBERTY IN ITS MODALITY OF KIDNAPPING

It is known that the above mentioned persons have been summoned for the judgment instituted against the victim, before the tribunal Judge of the District of the United States for the Central District of California. Therefore, for the localization of the above mentioned persons, we inform you that they are currently residing in, or around, Los Angeles, California.

For the purpose of identification, the Office of the Attorney General of Mexico proportions the following information of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and annexes a photocopy of his photograph.

PLACE OF BIRTH	AGUA CALIENTE, SINALOA, MEXICO
MARITAL STATUS:	MARRIED
AGE:	51 YEARS OLD
DATE OF BIRTH:	MAY 28, 1939
HAIR:	INSERTION OF CIRCULAR HAIR BETWEEN STRAIGHT AND ABUNDANT, GREYING BLACK
FOREHEAD:	LARGE
EYES:	BROWN
NOSE:	LARGE, DEEP, STRAIGHT, SLIGHTLY ELEVATED AND HORIZONTAL BASE

MOUTH:	SMALL WITH LARGE LIPS
CHIN:	VERTICAL INCLINATION, MEDIUM HEIGHT, MEDIUM WIDTH
EARS:	CONTOUR OF LOBE AT RIGHT ANGLE
COMPLEXION:	WHITE
BODY STRUCTURE:	MEDIUM
WEIGHT:	APPROXIMATELY 78 KILOS
HEIGHT:	1.73 METERS

The following information of HECTOR BERRELLEZ or ARTURO E. BERRELLEZ is also mentioned:

APPROXIMATE AGE:	43 TO 45 YEARS OLD
HEIGHT:	1.75 TO 1.78 METERS
BODY STRUCTURE:	ROBUST
HAIR:	CURLY, GREYING, AND SHORT
COMPLEXION:	WHITE
EYES:	LIGHT BROWN
EYELASHES:	CURLY
EYEBROWS:	ABUNDANT
NOSE:	STRAIGHT
MOUTH:	REGULAR
FACE:	ROUND
PARTICULAR SIGNS:	ON BOTH CHEEKS HE HAS SCARS FROM SMALLPOX OR ACNE.

The request for provisional detention is based on what is established by the Extradition Treaty, and therefore, the Office of the Attorney General of Mexico grants the promise of formalizing the application for extradition of ANTONIO GARATE BUSTAMANTE or JOSE ANTONIO GARATE BUSTAMANTE and HECTOR BERRELLEZ or ARTURO E. BERRELLEZ, within the limit established by the Treaty in reference and will start running when United States authorities succeed in the apprehension, during which lapse we will continue to send personal data for better identification and faster localization.

In view of the considerations of law and of facts that the Social Federal Representation expresses, and because this petition satisfies the requisites stated in the Extradition Treaty, currently in force between our two countries, and also satisfies the established by the Interna-

tional Extradition Act, this Ministry of Foreign Affairs, with basis on part IV of article 15 of its Bylaws, requests your intervention to the effect that procedure of the extradition of the accused may begin. We would appreciate being informed of any advances made on this request.

As a result, and since the above transcript indicates the events and facts related to the crime of which HECTOR BERRELLEZ or ARTURO E. BERRELLEZ is accused of, provides their description and whereabouts in the United States, promises to formalize the extradition request, declares the existence of a warrant of arrest issued by the competent judicial authority against him, I wish to submit to Your Excellency this information, which I assure is true, and request the provisional detention in reference.

I wish to assure Your Excellency of my personal commitment to formalize the extradition request within the sixty day period, starting from the date on which the provisional detention, for extradition purposes, of the above mentioned person is confirmed. For which reason, I would appreciate being informed, as soon as possible, of the date when the sixty day period mentioned in the Extradition Treaty starts running.

The provisional detention is requested without detriment that by the established conducts in the Treaty it be possible to perfect a different application of the for crimes other than the one which is foundation of this request.

In view of the above, Mr. Secretary, and considering that this petition abides by the terms of the Extradition Treaty currently in force between the United Mexican States and the United States of America, I request your kind meditation in ensuring that the competent U.S. authorities, including the U.S. judicial authorities, take the necessary measures to detain HECTOR BERRELLEZ or ARTURO E. BERRELLEZ for his subsequent extradition, from the United States of America to Mexico.

In thanking Your Excellency in advance for your valuable assistance concerning this request, I take this opportunity to renew to Your Excellency the assurance of my highest and most distinguished consideration.

Gustavo Petricioli
Ambassador

His Excellency
James A. Baker, III
Secretary of State
Washington, D.C.

APPENDIX C-1

Washington, D.C., a 19 de julio de 1990.

Señor Secretario:

En nombre de mi Gobierno, tengo a honra referirme al Tratado de Extradición suscrito entre los Estados Unidos Mexicanos y los Estados Unidos de América, para solicitar formalmente al Gobierno de Vuestra Excelencia, con base en los Articulos 1, 2 y, en particular, con fundamento en el Articulo 11 del citado tratado, la detención provisional con fines de extradición del señor HECTOR BERRELLEZ O ARTURO E. BERRELLEZ a quien las autoridades mexicanas reclaman por su probable responsabilidad en la commisión del delito de privación ilegal de la libertad con carácter de secuestro mismo que encaja dentro de la fracción 1 del Articulo 2° y el inciso 4) del Apéndice del Tratado de referencia, delito cometido en agravio del C. Doctor Humberto Alvarez Machain, por cuya razón se le sigue la causa penal numero 118/90 ante el Juez Primero de Distrito en Materia Penal en el Estado de Jalisco, de la que resultó orden de aprehensión en contra del reclamado, fechada el 9 de julio de 1990.

Lo anterior lo manifiesto a used en virtud de la gestión que me encomienda la Secretaria de Relaciones Exteriores del Gobierno Mexicano, mediante el oficio numero 7 5044 de fecha 16 de julio de 1990, cuyo texto, para todos los efectos legales a que haya lugar, el que suscribe, Embajador de Mexico ante los Estados Unidos de América, hace suyo y transcribe en su parte conducente a continuación:

"La Procuraduria General de la República, mediante oficio DAI-666/90, fechado el 13 del mes en curso solicita, con base en los articulos 102 y 119 de la Constitución Politica de los Estados Unidos Mexicanos, en el articulo 11 del Tratado de Extradición celebrado entre nuestro pais y los Estados Unidos de América, y en los

articulos 2 fracción VII, 9 fracción 11 de la Ley Orgánica de la Procuraduria General de la Republica, 4 del Código Penal para el Distrito Federal en Materia del Fuero Común y para toda la República en Materia del Fuero Federal y por ultimo en el articulo 3° de la Ley de Extradición Internacional, que por los conductos diplomáticos se requiera al Gobierno de los Estados Unidos de América, la detención provisional con fines de extradición de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, contra de quienes el Juez Primero de Distrito en Materia Penal en el Estado de Jalisco el 9 del mes y año en curso, en la causa penal número 118/90, libró orden de aprehensión en contra de los reclamados, por su probable responsabilidad en la comisión del delito de privación ilegal de la libertad con carácter de secuestro, ilicito previsto y sancionado en los articulos 366 fracción I, II y V en relación con el precepto 13 fracciones I, IV y V del Código Penal para el Distrito Federal en Materia del Fuero Común y para toda la Repúblicaa en Materia del Fuero Federal.

"La petición se fundamenta básicamente en el artículo II del Tratado invocado, considerándose applicable asimismo, la fracción I del articulo 2° y el inciso 4) de su Apéndice, ya que el delito imputado a los reclamados es punible en ambos países, con una pena de privación de la libertad mayor de un año.

"La Procuraduría General de la Republica efectuá una relación de hechos delictuosos imputados a los reclamados, quienes se encuentran prófugos de la Justicia Mexicana, en la forma siguiente.

"El 2 de abril de 1990, el C. Doctor Humberto Alvarez Machain, se encontraba en el interior del consultorio médico de su propiedad ubicado en Mexicaltzino 1853, en la ciudad de Guadalajara, Jalisco, cuando minutos después de haber atendido a una paciente de appellido Rodríguez, se presentaron cinco personas que portaban armas, mis-

mas que detuvieron al citado Alvarez Machain, ostentándose como elementos de cuerpos policiacos, arrancando al mismo tiempo los cables telefónicos.

"Posteriormente, estas personas condujeron al secuestrado por via terrestre al Municipio de Silao, Estado de Guanajuato, y de allí a la ciudad de León en el mismo Estado, para al día siguiente, o sea el 3 de abril de 1990, trasladarlo por vía aérea de esa ciudad a El Paso, Texas, Estados Unidos de América, habiéndose realizado el vuelo a bordo de un avión Turbo Comander, Modelo 810, color café claro con frajas color café obscuro, matriculo XA-PEW de seis plazas, propiedad de la empresa aérea denominada Aerojalisco, quien prestó el servicio solicitado por los secuestradores cubriendo la ruta Guadalajara-León-Cuidad Juárez-Guadalajara, habiéndose introducido, previa autorización de internamiento, a El Paso, Texas, Estados Unidos de América, aterrizando en el aeropuerto de ese lugar.

"Por declaración vertida por el C. Jorge Covarrubias Manrique, ante el Agente del Ministerio Público Federal, el 28 de abril de 1990 reconoció haber participado en el secuestro del Doctor Alvarez Machain, ye que el mismo fue un operativo de la Drug Enforcement Administration (D.E.A.), ordenado a través de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE por el señor HECTOR BERRELLEZ o ARTURO E. BERRELLEZ.

"Mediante declaración emitida por ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE, ante el Juez del Tribunal de Distrito de los Estados Unidos de América, para el Distrito Central de California, en el caso número CR87422(F)ER, el 25 de mayo de 1990, declaró que el secuestro de Humberto Alvarez, por él dirigido, fue aprobabo por HECTOR BERRELLEZ, quien ante la misma autoridad confirmó este dicho.

"De los hechos antes referidos, se desprende que presuntivamente ANTONIO GARATE BUSTAMANTE o

JOSE ANTONIO GARATE BUSTAMANTE acordó y preparó el secuestro del Doctor Humberto Alvarez Machain, y el 2 de abril de 1990, lo llevó a cabo en la ciudad de Guadalajara, Jalisco, para posteriormente trasladarlo a los Estados Unidos de América, todo ello con la aprobción de HECTOR BERRELLEZ, en su calidad de superior jerárquico dentro de la Drug Enforcement Administration (D.E.A.), por lo que la C. Juez Primero de Distrito en Materia Penal en el Estado de Jalisco, al relacionar éstos con los elementos de convicción aportados por el Ministerio Público Federal en la averiguación de la comisión del delito, consideró que los CC. ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMANTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, como probables responsables en la comisión del delito de PRIVACION ILEGAL DE LA LIBERTAD CON CARACTER DE SECUESTRO.

"Se tiene conocimiento de que los reclamados actualmente comparecen en el juicio instruído en contra del secuestrado, ante el Juez del Tribunal de Distrito de los Estados Unidos para el Distrito Central de California, por lo cual, para la lacolización de éstos, se proporciona como su paradero la ciudad de Los Angeles en ese Estado de California.

"Para efectos de identificación, la Procuraduria General de la República proporciona la media filiación de ANTONIO GARATE BUSTAMANTE o JOSE ANTONIO GARATE BUSTAMENTE y remite fotocopia simple de su fotografía.

LUGAR DE NACIMIENTO	AGUA CALIENTE, SINALOA, MEXICO
ESTADO CIVIL	CASADO
EDAD	51 AÑOS
FECHA DE NACIMIENTO	28-05-39
CABELLO	INSERCION DEL PELO CIRCULAR ENTRE LACIO Y ABUNDANTE, NEGRO ENTRECANO
FRENTE	GRANDE
OJOS	CAFE

NARIZ	GRANDE, PROFUNDA, RECTILINEA LIBERAMENTE ELEVADA Y BASE HORIZONTAL
BOCA	CHICA CON LABIOS GRUESOS
MENTON	INCLINACION VERTICAL, ALTURA MEDIANA, ANCHURA MEDIANA
OREJAS	CONTORNO DEL LOBULO EN ESCUADRA
TEZ	BLANCA
COMPLEXION	MERIANA
PESO	78 KILOS APROXIMADAMENTE
ESTATURA	1.73 METROS

Asimismo, proporciona la media filiación de HECTOR BERRELLEZ o ARTURO E. BERRELLEZ:

EDAD APPROXIMADA	43 A 45 AÑOS
ESTATURA	1.76 a 1.78 METROS
COMPLEXION	ROBUSTA
CABELLO	ONDULADO, ENTRECANO Y RECORTADO
TEZ	BLANCA
OJOS	CAFE CLARO
PESTAÑAS	RIZADAS
CEJAS	POBLADAS
NARIZ	RECTA
BOCA	REGULAR
CARA	REDONDA
SEÑAS PARTICULARES	EN AMBAS MEJILLAS TIENE CICATRICES DE VIRUELA O ACNE

"Por otra parte y en cumplimiento de lo previsto en el Tratado de Extradición invocado, la Procuraduría General de la República otorga la promesa de formalizar la SOLICITUD DE EXTRADICION de los señores ANTONIO GARATE BUSTAMENTE o JOSE ANTONIO GARATE BUSTAMENTE y HECTOR BERRELLEZ o ARTURO E. BERRELLEZ, dentro del término establecido por el Instrumento Internacional referido, contado a partir de la fecha en que las autoridades estadounidenses logren su detención, independientemente de aportarse mayores dato personales para su mejor identificación y más pronta localización.

En virtud de las consideraciones de derecho y de hecho que expresa la Representación Social Federal ya invocada, y en razón de que se satisfacen los requisitos del Tratado de Extradición celebrado entre ambos paises y satisface además lo establecido en la Ley de Extradición International; por lo anterior, esta Cancillería con base en la fracción IV, articulo 15 del Reglamento Interior de la misma, solicita su intervención para efecto de que se inicie el procedimiento de extradición de los requeridos, agradeciendo se nos informe respecto de los avances y gestiones que se efectúen al respecto."

Por lo anterior, toda vez que en el documento que arriba transcribo se expresan actos y hechos relacionados con el delito que se imputa al reclamado, su descripción y su paradero en territorio estadounidense, asi como la promesa de formalizar la solicitud de extradición respectiva y la existencia de una orden de aprehensión librada por autoridad judicial competente en su contra, hechos que me permito presentarios como veridicos que son ante Vuestra Excelencia, solicito la presente detención provisional.

Hago mía la promesa de formalizar la solicitud de extradición y que dentro del término de sesentas días, a partir de la fecha en que se me confirme la detención provisional de sujeto reclamado, presentaré en su términos, la solicitud formal correspondiente; por lo que le agradeceré comunicarme, a la brevedad posible, la fecha precisa en que comience a correr el plazo a que se hace mención en el Tratado de referencia.

La detención provisional se solicita sin perjuicio de que por los conductos establecidos en el propio Tratado se pueda perfeccionar solicitud distinta respecto del presunto extraditado por delitos distintos a los que son fundamento de esta solicitud.

Por loarriba seotnalado, Señor Secretario, al encontrarse la petición que hago, deqntro de los supuestos descritos fpor el Tratado de Extradición vigente entre nuestros dos

países, ruego a Usted su amable concurso para obtener de las autoridades estadounidenses competentes en la materia, incluso de las judiciales, el que se tomen las medidas necesarias para obtener la aprehensión, con fines ulteriores de extradición desde los Estados Unidos de América a México, del reclamado HECTOR BERRELLEZ o ARTURO E. BERRELEZ.

Al agradecer a Vuestra Excelencia, anticipadamente, su valioso concurso en la gestión solicitada, hago propicia la ocasión para renovarle las seguridades de mi más alta y distinguida consideración.

Gustavo Petricioli
Embajador

Al Excelentisimo Señor
James A. Baker III,
Secretario de Estado,
Ciudad

COMMUNICATION FROM SECRETARIA DE RELACIONES EXTERIORES CONSULADA GENERAL TO THE HONORABLE JUSTICES OF THE NINTH CIRCUIT COURT OF APPEALS

Secretaría
De
Relaciones Exteriores

NOVEMBER 9, 1990.

Consulado General

TO THE HONORABLE JUSTICES OF THE
NINTH CIRCUIT COURT OF APPEALS

RE: United States vs.
Humberto Alvarez
Machain No. 90-50459

I, JOSE ANGEL PESCADOR OSUNA, accredited at the United States Department of State as Consul General of the United Mexican States in Los Angeles, California, following the instructions of my government and in the exercise of my consular functions as provided by the 1963 Vienna Convention of Consular Relations, to which both Mexico and the United States are parties, wish to communicate to this honorable court the position of the Government of Mexico regarding the above referenced case which involves a mexican national.

In so doing, nothing in this communication or its submission shall be construed, in any way, as a waiver of the sovereign immunity which Mexico and its Consulate General enjoy in accordance with international law, nor as a submission to the jurisdiction of this Honorable Court.

In reference to this case, this communication takes into account the facts established in and adopted by the United States District Court for the Central District of California, and contained in the record before this Honorable Court.

The position of the Government of Mexico is as follows:

1.- The Government of Mexico concurs with part of the ruling of the United States District Court for the central District of California, as stated below.

2.- A violation has been committed to the Extradition Treaty in force between the two countries (henceforth "the Treaty"), and to the General Principles of International Law.

3.- Mexico expressed its official attitude to this violation as established in the record of the district Court, via diplomatic notes to the State Department of the United States, and sought the return to Mexico of DR. HUMBERTO ALVAREZ MACHAIN.

4.- Since under the Treaty the United States had the right to request the extradition of DR. ALVAREZ MACHAIN, the Treaty was applicable to DR. ALVAREZ MACHAIN.

5.- The Treaty recognizes certain rights possessed by individuals to whom the Treaty's provisions apply.

6.- Individuals have often gone to court to ensure observance of the rights they derive from this Treaty.

7.- It is from the Treaty itself, as well as from the official diplomatic attitude taken by Mexico to its violation in this case, that DR. ALVAREZ MACHAIN can oppose the violation to this detriment of the treaty and to the jurisdiction asserted over his person in the United States after his abduction from Mexico.

8.- The Treaty constitutes the exclusive and sole means by which the Government of the United States can seek to bring a Mexican National present in Mexico to justice. Mexican legislation in force and effect makes it illegal for Mexican Government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexi-

can territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement or agreement, either with the United States or with any other country, to surrender its own nationals.

In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably and expressly reserved to the parties the right to refuse the requested extradition to one of their own respective nationals, agreeing instead to prosecute them in their own national courts, in the interest of justice.

9.- The purpose and object of the Treaty, was from its inception, precisely to provide the legal framework, with which one of the parties could request of the other the extradition of persons from the territory of the former to the territory of the latter. The Treaty is binding on its parties, but serves no purpose if the parties are free to ignore its terms.

10.- The only legal means by which the United States could have pursued the prosecution of DR. HUMBERTO ALVAREZ MACHAIN, a Mexican national, was through the specific provision of the Treaty, which was negotiated, agreed upon and ratified precisely to deal, with the extradition of nationals. Article 9 its paragraph 1 that "neither contracting party shall be bound to deliver up its own nationals, but the executive of the requested party shall, if not prevented by the laws of the party, have the power to deliver them up if, in its discretion, it be deemed proper to do so'. Paragraph 2, on the other hand, provides that 'if extradition is not granted pursuant to paragraph 1 of this article, the requested party shall submit the case to its competent authorities for the purpose of prosecution, provided that party has jurisdiction over the offense".

11.- The judiciary of each of the parties to the Treaty is given, through several of the Treaty's provisions, ample participation in any extradition proceeding. There-

fore, the pronouncements of a nation court of one of the parties, in a case where the only legal means for bringing an individual to justice was to invoke the Extradition Treaty, in no way may be construed as an interference with the authority of the Executive branch for the conduct of Foreign Affairs.

12.- Not affirming the district court's holding in this case, would emasculate the Extradition Treaty for all practical and future effects. As governmental operations of this nature would receive implicit approval, and since abductions of Mexican suspects in the sovereign territory of Mexico would result in a legitimized assertion of personal jurisdiction, some United States authorities would find it easier not to resort to the binding terms of the Treaty.

13.- Moreover, not affirming the district court's holding in this case, would mean that a case such as the one at hand would be repeated, with all the negative diplomatic and legal consequences which have derived from it, to the detriment of the friendly relations that should always prevail between the two countries including in law enforcement and administration of justice matters, and which relationship should be maintained within the bounds of international law.

14.- The Mexican Government does not and will not limit itself to the mere reiteration of the criteria and principles stated above. The Mexican Government is in a position to insist that there is and always was an alternative means by which the interest of justice, so that crimes do not go unpunished. The Government of Mexico maintains that, in this case, justice can be administered, but that it has to be administered legally and in conformity with the requirements forth in the Extradition Treaty.

15.- The Mexican Government is consequently prepared to put into motion the administration of justice, as soon

as the Government of the United States, in compliance with article 9 of the Treaty, provides it with the necessary elements, as required by the Treaty, to enable it to comply in its turn with its treaty obligation to prosecute.

Respectfully,

JOSE ANGEL PESCADOR OSUNA
CONSUL GENERAL OF MEXICO
LOS ANGELES

The Treaty on Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656, provides:

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

The Government of the United States of America and the Government of the United Mexican States:

Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition;

Have agreed as follows:

ARTICLE 1

Obligation to Extradite

1. The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.

2. For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

a) its laws would provide for the punishment of such an offense committed in similar circumstances, or

b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

ARTICLE 2

Extraditable Offenses

1. Extradition shall take place, subject to this Treaty, for willful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.

2. If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3. Extradition shall also be granted for willful acts which although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4. Subject to the conditions established in paragraphs 1, 2 and 3, extradition shall also be granted:

a) For the attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

b) When, for the purpose of granting jurisdiction to the United States government, transportion of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

ARTICLE 3

Evidence Required

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for

trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

ARTICLE 4

Territorial Application

1. For the purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

2. For the purposes of this Treaty, an aircraft shall be considered to be in flight at any time from the moment when all its external doors are closed following the embarkation until the moment when any such door is opened for disembarkation.

ARTICLE 5

Political and Military Offenses

1. Extradition shall not be granted when the offense for which it is requested is political or of a political character.

If any question arises as to the application of the foregoing paragraph, the Executive authority of the requested Party shall decide.

2. For the purpose of this Treaty, the following offenses shall not be considered to be offenses included in paragraph 1:

a) The murder or other willful crime against the life or physical integrity of a Head of State or Head of Government or of his family, including attempts to commit such an offense.

b) An offense which the Contracting Parties may have the obligation to prosecute by reason of a multilateral international agreement.

3. Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

ARTICLE 6

Non bis in idem

Extradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.

ARTICLE 7

Lapse of Time

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party.

ARTICLE 8

Capital Punishment

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 9

Extradition of Nationals

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

ARTICLE 10

Extradition Procedures and Required Documents

1. The request for extradition shall be made through the diplomatic channel.

2. The request for extradition shall contain the description of the offense for which extradition is required and shall be accompanied by:

a) A statement of the facts of the case;

b) The text of the legal provisions describing the essential elements of the offense;

c) The text of the legal provisions describing the punishment for the offense;

d) The text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense;

e) The facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location.

3. In addition, when the request for extradition relates to a person who has not yet been convicted, it shall be accompanied by:

a) A certified copy of the warrant of arrest issued by a judge or other judicial officer of the requesting Party;

b) Evidence which, in accordance with the laws of the requested Party, would justify the apprehension and commitment for trial of the person sought if the offense had been committed there.

4. When the request for extradition relates to a convicted person, it shall be accompanied by a certified copy of the judgment of conviction imposed by a court of the requesting Party.

If the person was found guilty but not sentenced, the extradition request shall be accompanied by a certification to that effect and a certified copy of the warrant of arrest.

If such person has already been sentenced, the request for extradition shall be accompanied by a certification of the sentence imposed and a statement indicating which part of the sentence has not been carried out.

5. All the documents that must be presented by the requesting Party in accordance with the provisions of this Treaty shall be acompanied by a translation in the language of the requested Party.

6. The documents which, according to this Article, shall accompany the request for extradition, shall be received in evidence when:

a) In the case of a request emanating from the United States, they are authenticated by the official seal of the Department of State and legalized by the manner prescribed by the Mexican law;

b) In the case of a request emanating from the United Mexican States, they are certified by the principle diplomatic or consular officer of the United States in Mexico.

ARTICLE 11

Provisional Arrest

1. In the case of urgency, either Contracting Party may request, through the diplomatic channel, the provisional arrest of an accused or convicted person. The application shall contain a description of the offense for which the extradition is requested, a description of the person sought and his whereabouts, an undertaking to formalize the request for extradition, and a declaration of the existence of a warrant of arrest issued by a competent judicial authority or a judgment of conviction issued against the person sought.

2. On receipt of such a request, the requested Party shall take the necessary steps to secure the arrest of the person claimed.

3. Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person claimed, the executive authority of the requested Party has not received the formal request for extradition and the documents mentioned in Article 10.

4. The fact that the provisional arrest is terminated pursuant to paragraph 3 shall not prejudice the extradition of the person sought if the request for extradition and the necessary documents mentioned in Article 10 are delivered at a later date.

ARTICLE 12

Additional Evidence

If the Executive authority of the requested Party considers that the evidence furnished in support of

the request for extradition is not sufficient in order to fulfill the requirements of this Treaty, that Party shall request the presentation of the necessary additional evidence.

ARTICLE 13

Procedure

1. The request for extradition shall be processed in accordance with the legislation of the requested Party.

2. The requested Party shall make all arrangements necessary for internal procedures arising out of the request for extradition.

3. The competent legal authorities of the requested Party shall be authorized to employ all legal means within their power to obtain from the judicial authorities the decisions necessary for the resolution of the request for extradition.

ARTICLE 14

Decision and Surrender

1. The requested Party shall promptly communicate to the requesting Party its decision on the request for extradition.

2. In the case of complete or partial rejection of a request for extradition, the requested Party shall give the reasons on which it was based.

3. If the extradition is granted, the surrender of the person sought shall take place within such time as may be prescribed by the laws of the requested Party. The competent authorities of the Contracting Parties shall agree on the date and place of the surrender of the person sought.

4. If the competent authority has issued the warrant or order for the extradition of the person sought and he is not removed from the territory of the requested Party within the prescribed period, he shall

be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE 15

Delayed Surrender

The requested Party, after granting the extradition, may defer the surrender of the person sought when that person is being proceeded against or is serving a sentence in the territory of the requested Party for a different offense, until the conclusion of the proceeding or the full execution of the punishment that has been imposed.

ARTICLE 16

Requests for extradition made by Third States

The requested Party, in the case of receiving requests from the other Contracting Party and from one or more third States for the extradition of the same person, be it for the same offense or for different offenses, shall decide to which requesting State it shall grant the extradition of that person.

ARTICLE 17

Rule of Specialty

1. A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

a) He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

b) He has not left the territory of the requesting Party within 60 days after being free to do so; or

c) The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

2. If, in the course of the procedure, the classification of the offense is changed for which the person requested was extradited, he shall be tried and sentenced on the condition that the offense, in its new legal form:

a) Is based on the same group of facts established in the request for extradition and in the documents presented in its support; and

b) Is punishable with the same maximum sentence as the crime for which he was extradited or with a lesser sentence.

ARTICLE 18

Summary Extradition

If the person sought informs the competent authorities of the requested Party that he agrees to be extradited, that Party may grant his extradition without further proceedings, and shall take all measures permitted under its laws to expedite the extradition. In such cases Article 17 shall not be applicable.

ARTICLE 19

Surrender of Property

1. To the extent permitted under the law of the requested Party and subject to the rights of third parties, which shall be duly respected, all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution,

or which in any other manner may be material evidence for the prosecution, shall be surrendered upon the granting of the extradition even when extradition cannot be effected due to the death, disappearance, or escape of the accused.

2. The requested Party may condition the surrender of articles upon a satisfactory assurance from the requesting Party that the articles will be returned to the requested Party as soon as possible.

ARTICLE 20

Transit

1. The right to transport through the territory of one of the Contracting Parties a person who is not a national of that Contracting Party surrendered to the other Contracting Party by a third State shall be granted on presentation made through the diplomatic channel of a certified copy of the decision on extradition, provided that reasons of public order are not opposed to the transit.

2. The authorities of the transit State shall be in charge of the custody of the extradited person while that person is in its territory.

3. The Party to which the person has been extradited shall reimburse the State through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 21

Expenses

The requested Party shall bear the expenses of the arrangements referred to in Article 13, with the exception that the expenses incurred for the translation of documents and, if applicable, for the transportation of the person ordered extradited shall be paid by the requesting Party.

ARTICLE 22

Scope of Application

1. This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force.

2. Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1989,[1] and the Additional Conventions on Extradition of 25 June 1902,[2] 23 December 1925,[3] and 16 August 1939.[4]

ARTICLE 23

Ratification, Entry into Force, Denunciation

1. This Treaty shall be subject to ratification; the exchange of instruments of ratification shall take place in Washington as soon as possible.

2. This Treaty shall enter into force on the date of exchange of the instruments of ratification.

3. On entry into force of this Treaty, the Treaty of Extradition of 22 February 1899 and the Additional Conventions on Extradition of 25 June 1902, 23 December 1925 and 16 August 1939 between the United States of America and the United Mexican States, shall cease to have effect without prejudice to the provisions of Article 22.

4. Either Contracting Party may terminate this Treaty by giving notice to the other Party. The termination shall take effect six months after the receipt of such notice.

---

[1] TS 242; 31 Stat. 1818.

[2] TS 421; 9 Bevrans 918.

[3] TS 741; 44 Stat. 2409.

[4] TS 967; 55 Stat. 1183.

Done in two originals, in the English and Spanish languages, both equally authentic, at Mexico City this fourth day of May, one thousand nine hundred seventy-eight.

/s/ Cyrus Vance [1]
For the Government of the
United States of America

/s/ S. Roel [2]
For the Government of the
United Mexican States

---

[1] Cyrus Vance.

[2] S. Roel.

APPENDIX

1. Murder or manslaughter; abortion.
2. Malicious wounding or injury.
3. Abandonment of minors or other dependents when there is danger of injury or death.
4. Kidnapping; child stealing; abduction; false imprisonment.
5. Rape; statutory rape; indecent assault; corruption of minors, including unlawful sexual acts with or upon children under the age of consent.
6. Procuration; promoting or facilitating prostitution.
7. Robbery; burglary; larceny.
8. Fraud.
9. Embezzlement.
10. An offense against the laws relating to counterfeiting and forgery.
11. Extortion.
12. Receiving or transporting any money, valuable securities, or other property knowing the same to have been unlawfully obtained.
13. Arson; malicious injury to property.
14. Offenses against the laws relating to the traffic in, possession, production, manufacture, importation or exportation of dangerous drugs and chemicals, including narcotic drugs, cannabis, psychotropic drugs, opium, cocaine, or their derivatives.
15. Offenses against the laws relating to the control of poisonous chemicals or substances injurious to health.

16. Piracy.

17. Offenses against the safety of means of transportation including any act that would endanger a person in a means of transportation.

18. An offense relating to unlawful seizure or exercise of control of trains, aircraft, vessels, or other means of transportation.

19. Offenses against the laws relating to prohibited weapons, and the control of firearms, ammunition, explosives, incendiary devices or nuclear materials.

20. An offense against the laws relating to international trade and transfers of funds or valuable metals.

21. An offense against the laws relating to the importation, exportation, or international transit of goods, articles, or merchandise, including historical or archeological items.

22. Violations of the customs laws.

23. Offenses against the laws relating to the control of companies, banking institutions, or other corporations.

24. Offenses against the laws relating to the sale of securities, including stocks, bonds and instruments of credit.

25. Offenses against the laws relating to bankruptcy or rehabilitation of a corporation.

26. Offenses against the laws relating to prohibition of monopoly or unfair transactions.

27. Offenses against the laws relating to protection of industrial property or copyright.

28. Offenses against the laws relating to abuse of official authority.

29. Bribery, including soliciting, offering and accepting bribes.

30. Perjury; false statements to any governmental authority. Subornation of perjury or false statements.

31. Offenses against the laws relating to obstruction of justice, including harboring criminals and suppressing evidence.

SUPREME COURT OF THE UNITED STATES

No. 91-712

UNITED STATES, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ORDER ALLOWING CERTIORARI

Filed January 10, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. Petitioner's brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Any reply brief is to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992.

January 10, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 262203 47006

FILED
FEB 13 1992
OFFICE OF THE CLERK

No. 91-712

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a person whom the government brings to this country for criminal prosecution by means other than those provided in an extradition treaty has a right not to be tried in this country's courts.

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In the Supreme Court of the United States

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v.

HUMBERTO ALVAREZ-MACHAIN

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 946 F.2d 1466. The opinion of the district court (Pet. App. 4a-41a) is reported at 745 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1991. The petition for a writ of certiorari was filed on October 25, 1991, and granted on January 10, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

TREATY INVOLVED

The extradition treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, is reprinted at J.A. 72-87.

STATEMENT

1. *Respondent's Indictment and Apprehension*

In February 1985, Special Agent Enrique Camarena of the Drug Enforcement Administration (DEA) was kidnapped, tortured, and murdered in Mexico. A month later, the bodies of Agent Camarena and Alfredo Zavala-Avelar, a Mexican pilot working with Camarena, were found outside of Guadalajara, Mexico. Pet. App. 5a-7a.

Together with 18 others, respondent was subsequently indicted in the United States District Court for the Central District of California on charges growing out of the torture and murders of Camarena and Zavala-Avelar. J.A. 12-32.[1] The government anticipates that it would establish at trial that respondent, a medical doctor, used his medical skills to prolong Camarena's life so that others could continue interrogating and torturing him.

Respondent is a citizen and resident of Mexico. In 1989 and 1990, DEA officials attempted to bring respondent to this country through informal negotiations with representatives of the Mexican government. Those negotiations failed.[2] The DEA continued discussions, how-

---

[1] Respondent was charged with committing violent acts in aid of racketeering and conspiring to do so, in violation of 18 U.S.C. 371 and 1959; kidnapping a federal agent and conspiring to do so, in violation of 18 U.S.C. 1201(c) and 1201(a)(5); and murdering a federal agent, in violation of 18 U.S.C. 1111.

[2] In December 1989, Jorje Castillo del Rey, a commandante in the Mexican Federal Judicial Police (MFJP), contacted a DEA informant to suggest a meeting regarding the possible exchange of a Mexican national implicated in Camarena's murder for a Mexican fugitive, Isaac Naredo Moreno, who was living in the United States.

ever, with Antonio Garate-Bustamante, a DEA informant who had served as an intermediary between the Mexican government and the DEA. DEA Agent Hector Berrellez instructed Garate to tell his contacts in Mexico that the DEA was willing to pay for information leading to the arrests of the persons responsible for Camarena's death. In March 1990, Garate informed Agent Berrellez that he had "associates" in Mexico who thought they could apprehend respondent and deliver him to the United States. Agent Berrellez instructed Garate to tell his associates that, in return for the delivery of respondent to the DEA's custody in the United States, the DEA would pay a $50,000 reward plus expenses. Pet. App. 7a-9a. Garate relayed that offer to his associates. *Id.* at 10a.

On the evening of April 2, 1990, five or six armed men apprehended respondent in his office in Guadalajara. Respondent was then driven to Leon, Mexico, and flown to El Paso, Texas. Respondent's plane landed in El Paso on April 3, 1990. DEA agents arrested him as he left the plane. As of May 25, 1991, the DEA had made a total of $20,000 in reward payments to the Mexican individuals who apprehended respondent. The DEA also

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On December 13, 1989, two DEA agents met with Castillo in Los Angeles, California. Castillo represented that he was working for the chief of the MFJP fugitive detail and that he was present with the knowledge and authority of the Mexican Attorney General. The meeting resulted in an understanding that respondent would be delivered to this country, and that the United States would investigate the immigration status of Moreno and would institute deportation proceedings if they were warranted. Pet. App. 7a-8a. The delivery of respondent was to occur after the Christmas holiday. The Mexican officials requested that the exchange be carried out "under the table" to avoid upsetting Mexican citizens. *Id.* at 8a. The arrangement fell apart, however, when the DEA refused to make a $50,000 advance payment required by Mexican officials to bring respondent to the border. *Ibid.* Although Castillo requested a second meeting in January 1990, the DEA cancelled the meeting because of concerns that it was a "set up" by the Mexican officials. *Id.* at 8a-9a.

brought to the United States seven of the persons involved in the apprehension as well as their families. For a time, the DEA paid the living expenses of those persons. Pet. App. 10a-11a.

On April 18, 1990, the Embassy of Mexico presented a diplomatic note to the United States Department of State requesting a report on possible American participation in respondent's abduction. J.A. 33. The note added that Mexico was conducting its own investigation of the case. *Ibid.* A month later, the Embassy of Mexico presented a second diplomatic note to the Department of State. That note stated that the Mexican government believed that respondent's abduction and transfer to the United States had been accomplished with the knowledge of persons working for the United States government, "in violation of the procedure established in the extradition treaty in force between the two countries." J.A. 35. The note demanded respondent's return. J.A. 36. Finally, on July 19, 1990, the Embassy of Mexico presented two diplomatic notes to the Department of State requesting the provisional arrest and extradition of Garate and Agent Berrellez because of their involvement in respondent's abduction. J.A. 39-45, 53-59.

2. The District Court's Opinion

Respondent filed a motion to dismiss the indictment based on the manner of his apprehension. Invoking the Due Process Clause of the Fifth Amendment, international law, and the extradition treaty between the United States and Mexico, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, respondent argued that the district court lacked personal jurisdiction over him because agents of the United States had forcibly removed him from Mexico. Pet. App. 4a-5a.

The district court rejected respondent's due process claim, finding it foreclosed by *Ker* v. *Illinois*, 119 U.S. 436 (1886), and *Frisbie* v. *Collins*, 342 U.S. 519 (1952). The court explained that under the so-called *Ker-Frisbie* doctrine, the forcible abduction of a defendant from an-

other jurisdiction does not deprive a court of the power to try him on criminal charges. Pet. App. 13a-16a.[3]

The court found merit, however, in respondent's contention that his abduction violated the extradition treaty between the United States and Mexico. The court first determined that the *Ker-Frisbie* doctrine is inapplicable to a claimed violation of a treaty. Pet. App. 16a-18a. The court then held that the extradition treaty with Mexico bars agents of one country from seizing persons in the other country in order to prosecute them. The court thought it "axiomatic" that a party to an extradition treaty violates its treaty obligations when it unilaterally abducts a person from the territory of a treaty partner. *Id.* at 25a-28a. Finally, the court held that a person abducted in that fashion can obtain relief under the treaty if the offended country formally objects to the abduction. *Id.* at 18a-23a.[4]

In this case, the court found, "the DEA and its informants were integrally involved in [respondent's] abduction" and the United States was therefore chargeable with the acts of the abductors as its agents. Pet. App.

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[3] The court also rejected respondent's contention that the circumstances of his abduction fit within an exception to the *Ker-Frisbie* doctrine for cases in which the defendant demonstrates governmental misconduct of "the most shocking and outrageous kind." Pet. App. 15a, quoting *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65-66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975). The court found that respondent's allegations of mistreatment "are not worthy of belief" and that even if the allegations of mistreatment were true, the mistreatment would not rise to the level of shocking and outrageous misconduct. Pet. App. 16a.

[4] Because the court held that the extradition treaty was violated, it did not reach respondent's claim that he was entitled to relief because his apprehension violated the Charter of the United Nations and the Charter of the Organization of American States. Pet. App. 37a. The court noted, however, that "the weight of authority indicates that these international instruments are not self-executing and therefore are not enforceable in federal courts absent implementing legislation." *Id.* at 38a.

24a-25a. Because Mexico filed a formal protest, the court held that the abduction violated the extradition treaty and gave respondent standing to raise the violation in his criminal case. As a remedy for the violation, the court ordered the United States to return respondent to Mexico. *Id.* at 36a-37a. The court viewed that action as necessary to effectuate the principle of international law that a State must go "as far as possible" to make reparation for a violation of an international obligation and must "wipe out all the consequences of the illegal act." *Id.* at 36a, quoting 2 *Restatement (Third) of the Foreign Relations Law of the United States* § 901, at 343, Reporter's Note 3 (1987). The district court refused, however, to dismiss the indictment.

3. *The Ruling in United States v. Verdugo-Urquidez*

The United States appealed. While the appeal was pending, the court of appeals issued its opinion in *United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (1991), petition for cert. pending, No. 91-670. Verdugo had been convicted on charges growing out of the torture and murder of Agent Camarena. Like respondent, Verdugo contended that he had a right not to be tried in this country's courts based on the manner of his removal from Mexico. The court of appeals accepted that claim.

The court of appeals first held that Verdugo's claims were not barred by the *Ker-Frisbie* doctrine. The court stated that the *Ker-Frisbie* doctrine does not apply when the government sponsors an abduction from a foreign country, arguably in violation of an extradition treaty, and the foreign government objects to the abduction. 939 F.2d at 1345-1349.

Next, the court of appeals declared that the extradition treaty between the United States and Mexico implicitly bars the United States from abducting a person from Mexico in order to prosecute him in the United States. Although not relying on any express treaty pro-

vision, the court said that it would "make[] no sense" to construe an extradition treaty not to proscribe an individual's abduction from a foreign State without that State's consent. 939 F.2d at 1351. The court rejected the government's argument that a court may not imply such a term in an extradition treaty, and it gave no weight to the Executive Branch's view that the treaty between the United States and Mexico contains no such implicit term. *Id.* at 1348, 1353-1355.

The court of appeals further held that if the foreign country objects to the abduction, the defendant has derivative standing to claim that the extradition treaty was violated. 939 F.2d at 1355-1357. The court dismissed the contention that such a claim implicates political questions that are unsuited for judicial resolution. *Id.* at 1357-1358.

Finally, the court ruled that the appropriate remedy for a treaty violation is to repatriate the improperly seized individual to the country from which he was taken. The court explained that such a remedy is required "[i]n order to restore the offended nation to the position in which it would have been had the United States complied with the treaty." 939 F.2d at 1360.[5]

4. The Court of Appeals' Decision In This Case

Based on the legal rulings announced in *Verdugo*, the court of appeals affirmed the district court's order requiring respondent's repatriation. Pet. App. 2a. The court observed that the government did not dispute on appeal that respondent was abducted by paid agents of the DEA and that the abduction was accomplished at the DEA's behest. Thus, the court noted, it was not necessary to order a remand to determine whether the United States had authorized or sponsored the defendant's abduction,

[5] Because the district court in *Verdugo* had made no finding that the United States authorized or sponsored Verdugo's abduction from Mexico, the court of appeals remanded the case for proceedings to consider that issue. 939 F.2d at 1360.

because "the requisite findings" about the government's actions had already been made. *Ibid.* The court also noted that the Mexican government had "unequivocally" claimed that respondent's abduction violated the extradition treaty between the United States and Mexico, and that the Mexican government has "at all times" insisted that respondent be repatriated.[6] Accordingly, the court found, "there remains no question about the adequacy of Mexico's protest in this case or about Mexico's demand for repatriation." *Id.* at 3a. The court therefore affirmed the district court's order requiring respondent's repatriation to Mexico. *Ibid.*[7]

SUMMARY OF ARGUMENT

A.1. For more than a century, this Court has held that a court's authority to try a defendant for crimes is not impaired by the fact that the defendant was abducted from another jurisdiction. The *Ker-Frisbie* doctrine, as that proposition is called, is directly applicable in this case. It reflects the judgment, expressed in a wide variety of settings, that foreclosing prosecution is too high a price for society to pay for an unlawful arrest.

2. The court of appeals erred in concluding that this case fits into an exception to the *Ker-Frisbie* doctrine. The *Ker-Frisbie* doctrine is inapplicable when the government obtains custody of a defendant under an extradi-

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[6] On November 9, 1990, Mexico's Consul General in Los Angeles sent a letter directly to the court of appeals reiterating Mexico's view that the seizure of respondent violated the extradition treaty and that respondent should be returned to Mexico. J.A. 8, 67-71.

[7] The court of appeals also stated that *Verdugo* required dismissal of the indictment. Pet. App. 3a. That statement was incorrect. *Verdugo* did not hold that an indictment must be dismissed as a remedy for the sort of treaty violation asserted in this case. Moreover, that statement in the court of appeals' opinion was inconsistent with the court's own judgment in the case. The district court had expressly refused to dismiss the indictment, *id.* at 40a, and the court of appeals affirmed the district court's judgment in all respects. *Id.* at 3a.

tion treaty, since the treaty may give rise to rights in favor of persons brought to this country pursuant to the treaty. More generally, the doctrine is inapplicable when a treaty provides that a violation of the treaty will restrict the jurisdiction of the offending nation's courts. Neither case is presented here, however. Respondent was not apprehended under our extradition treaty with Mexico, and that treaty contains no provision barring the exercise of criminal jurisdiction when custody of the defendant is obtained by an extraterritorial arrest.

B. The court of appeals sought to circumvent the *Ker-Frisbie* doctrine by holding that respondent's abduction violated the extradition treaty between this country and Mexico. The extradition treaty, however, does not address such extraterritorial arrests.

1. The court of appeals, while recognizing that the extradition treaty does not expressly address extraterritorial arrests, nevertheless reached the unprecedented conclusion that respondent's abduction violated an implied obligation arising under the treaty. In fact, however, the government's conduct in this case violated no provision of that treaty, express or implied.

Our extradition treaty with Mexico, like extradition treaties generally, does not regulate apprehensions that are conducted outside the extradition context. Extradition treaties establish rules and procedures that govern the process by which one State assists another in obtaining custody of a fugitive. Our treaty with Mexico serves that limited objective. No provision in its text, and nothing in its history, suggests that it regulates apprehensions made without invoking the treaty's terms. The treaty is not a general compact for the protection of territorial rights, and courts are not empowered to rewrite the Nation's treaties to suit their notions of proper international behavior.

2. The *Ker-Frisbie* principle is a familiar feature of our law with respect to international relations, and it has informed our diplomatic and legal relations with

Mexico over the years. It would fly in the face of that history to suggest that our extradition treaty with Mexico silently overruled the *Ker-Frisbie* principle and rendered extraterritorial arrests a violation of an implied obligation under the treaty. The United States is party to more than 100 extradition treaties, none of which has ever been read to restrict the ability of the United States to act unilaterally in apprehending fugitives abroad.

3. International compacts such as the United Nations Charter and the Charter of the Organization of American States provide no support for the court of appeals' rule in this case. Because those compacts explicitly address issues of territorial integrity, it would be surprising if the same issues were addressed in extradition treaties by implication. Moreover, those compacts have never been thought to be enforceable in a United States court. It would be anomalous to hold that extradition treaties, which do not even address the issue of extraterritorial arrests, nevertheless create by implication enforceable rights that can be raised by a criminal defendant in a domestic trial.

C. Even if the extradition treaty contains an implied obligation that was violated in this case, a criminal defendant has no standing to raise that claim, whether or not Mexico protests the defendant's apprehension.

1. There is nothing in the treaty to suggest that a person in respondent's position may assert, in court, Mexico's objection to his apprehension. Ordinarily, treaties are enforced by the sovereign nations that are party to them; private individuals have no enforceable rights under the treaties absent a clear provision to the contrary. The extradition treaty in this case creates no such mechanism for private enforcement.

2. To recognize a private right to raise an implied treaty provision barring extraterritorial arrests would violate the principles underlying the political question doctrine. Courts have properly been cautious about creat-

ing individually enforceable rights in areas such as foreign relations that are far from the courts' ordinary sphere of competence. Courts are not well suited to interpret diplomatic notes, assess the status of this country's relationship with other nations, and balance this country's interest in maintaining good relations with foreign powers against the need to enforce our criminal laws. For a court to take on those functions, without any express mandate in a treaty or statute, would invade the province of the Executive Branch to direct this country's international affairs.

Accordingly, the extradition treaty with Mexico should not be interpreted to grant to respondent, by implication, an enforceable right to be repatriated to Mexico because of the manner of his apprehension. The court of appeals should have applied the *Ker-Frisbie* rule and required respondent to stand trial on the charges against him.

ARGUMENT

THE COURT OF APPEALS ERRED IN ORDERING THE UNITED STATES TO REPATRIATE RESPONDENT TO MEXICO

A. The *Ker-Frisbie* Doctrine Bars A Court From Ordering A Defendant's Repatriation Based On The Manner Of His Apprehension

This Court has consistently held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952); see *Ker* v. *Illinois*, 119 U.S. 436 (1886). That proposition, known as the *Ker-Frisbie* doctrine, is directly applicable to this case. Regardless of whether the asserted violation is of an extradition treaty, a federal statute, or the Constitution, immunity from prosecution is not to be implied as a remedy for an illegal arrest, whether the arrest occurs in this country or abroad. The court of appeals' holding

that a violation of the extradition treaty with Mexico allows respondent to defeat his prosecution cannot be reconciled with that doctrine.

1. *A Forcible Abduction Does Not Give the Defendant a Right to Avoid Trial*

Frederick M. Ker, the defendant in *Ker* v. *Illinois*, was convicted in Illinois state court on larceny and embezzlement charges after being apprehended in Peru. Ker alleged that the President of the United States had dispatched an agent with a warrant requesting Ker's extradition pursuant to an extradition treaty between the United States and Peru. According to Ker's allegations, the agent never contacted the Peruvian government or presented the extradition warrant. Instead, he forcibly kidnapped Ker in Peru and brought him to the United States. Ker claimed that, because of his forcible abduction, his trial violated due process as well as the extradition treaty between the United States and Peru. 119 U.S. at 438-439, 441. This Court rejected those contentions, holding that neither the Due Process Clause nor the extradition treaty gave Ker the right to avoid trial. *Id.* at 440-444.

Ker claimed that he had a "positive right" not to be "forcibly removed from Peru to the State of Illinois" except "in accordance with the provisions of the [extradition] treaty." 119 U.S. at 441. The Court, however, held that the treaty created no such right. To the contrary, the treaty had no application at all, because it was not "called into operation, was not relied upon, [and] was not made the pretext of arrest." *Id.* at 443. Accordingly, Ker was "clothed with no rights which a proceeding under the treaty could have given him." *Ibid.* The Court concluded that "we do not see that the Constitution, or laws, or treaties, of the United States guarantee [Ker] any protection" against having to stand trial after "his forcible seizure in another country, and transfer by violence, force, or fraud, to this country." *Id.* at 444.

In cases concerning state criminal trials following abductions from another State, this Court has repeatedly described the principle of *Ker* in broad terms. For example, in *Pettibone* v. *Nichols*, 203 U.S. 192, 208 (1906), the Court stated: "The principle upon which the judgment [in *Ker*] rested was that, when a criminal is brought or is in fact within the jurisdiction and custody of a State, charged with a crime against its laws, the State may, so far as the Constitution and laws of the United States are concerned, proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the State." The Court specifically rejected the contention that *Ker* is inapplicable when the defendant's apprehension is accomplished by government action, rather than by the acts of private persons. *Id.* at 215-216. Similarly, in *Cook* v. *Hart*, 146 U.S. 183, 192 (1892), the Court indicated that *Ker* and its progeny establish that "this [C]ourt will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State." The Court summarized the controlling doctrine in *Lascelles* v. *Georgia*, 148 U.S. 537, 543 (1893), stating:

> [I]t is settled by the decisions of this [C]ourt that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process.

These cases reveal the breadth of *Ker's* underlying principle: the forcible abduction of a defendant does not divest the court of jurisdiction or provide the defendant with immunity from trial, absent clear directions in a statute or treaty.

The rule in *Ker* was not a novel one; it accorded with the common law rule rejecting the argument that the arrest of a fugitive abroad vitiates the court's jurisdiction—a line of cases that *Ker* noted as being of the "highest respectability." 119 U.S. at 444; see also *Mahon* v. *Justice*, 127 U.S. 700, 708-712 (1888). For example, in *State* v. *Brewster*, 7 Vt. 118 (1835), the defendant asserted that he was forcibly removed from Canada and that the court should therefore release him. The court rejected his contention—strikingly similar to respondent's claim—stating that once a fugitive was "retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice." *Id.* at 121. Any protest by the foreign State, the court indicated, must be adjusted between the governments of the two countries. *Id.* at 121-122 ("The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court.").[8] Nineteenth century precedents from England reflect the same view.[9]

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[8] The Court in *Ker* also cited *The Ship Richmond* v. *United States*, 13 U.S. (9 Cranch) 102, 104 (1815), in which the Court ruled that the seizure of a vessel from another country's jurisdiction, in violation of that country's rights, did not bar United States courts from conducting condemnation proceedings, and *State* v. *Ross*, 21 Iowa 467, 472 (1866), in which the court upheld a prosecution following an interstate abduction, stating: "That our own laws have been violated is sufficiently shown by the indictment. For this the State had a right to detain the prisoners, and it is of no importance how or where their capture was effected." See 119 U.S. at 444.

[9] See *Ex parte Scott*, 9 B. & C. 446, 448 (1829) (upholding prosecution following apprehension of defendant by an English police officer in Brussels; the court "cannot inquire into" the "circumstances under which [the defendant] was brought" before the court); *R.* v. *Lopez and Sattler*, 1 Dearsly & Bell's Crown Cases 525, 546-547 (1858) (upholding prosecution for murder committed after an ap-

In *Frisbie* v. *Collins*, *supra*, the Court reaffirmed that principle. Collins alleged that he was abducted from Chicago, Illinois, by Michigan law enforcement officers and forcibly returned to Michigan. He claimed that his trial and conviction violated his rights under the Due Process Clause and the Federal Kidnapping Act, 18 U.S.C. 1201 (1952). 342 U.S. at 519-520. The Court dismissed the due process claim on the basis of *Ker*, noting that the Court has "never departed" from the rule that the forcible abduction of a defendant does not divest a court of jurisdiction to try the defendant on criminal charges. *Id.* at 522. The Court also held that, even if the abduction violated the Federal Kidnapping Act, nothing in that statute suggests that its violation would give rise to a sanction "barring a state from prosecuting persons wrongfully brought to it by its officers." *Id.* at 523.

The applicability of the *Ker-Frisbie* doctrine does not depend on whether a foreign government objects to the seizure of the defendant, or whether the kidnapping is sponsored by the government or a private party. *Ker* announced a general rule of decision for domestic courts, and made no reference to whether the foreign government had objected to the defendant's removal. Subsequent decisions, such as *Frisbie* v. *Collins*, have made it clear that the *Ker* doctrine applies regardless of whether the abduction is attributable to government officials or private parties.[10]

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prehension abroad; jurisdiction over defendant was not affected "whether the capture * * * and the subsequent detention were lawful or unlawful").

[10] In *Ker*, the abduction was effected by an agent who was sent to Peru bearing the President's extradition request and instructed to return with Ker. Under contemporary jurisprudence, the government likely would be held accountable for that conduct. The Court made only fleeting reference to that issue, stating that the abduction was "without any pretence of authority under the treaty or from the government of the United States." 119 U.S. at 443. In any event, the decision in *Frisbie* establishes that the wrongful appre-

This Court has repeatedly held that the *Ker-Frisbie* rule applies to arrests that violate the Constitution; regardless of the unlawfulness of the defendant's apprehension, courts may not seek to remedy the violation by precluding the defendant's prosecution. See *New York* v. *Harris*, 110 S. Ct. 1640, 1643 (1990) ("There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest."); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."); *United States* v. *Crews*, 445 U.S. 463, 474 (1980) ("Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt."); *Stone* v. *Powell*, 428 U.S. 465, 485 (1976) ("judicial proceedings need not abate when the defendant's person is unconstitutionally seized"); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975) (pretrial detention in violation of the Fourth Amendment cannot justify immunity from prosecution for the prisoner).[11]

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hension of the defendant by government officials is no more a basis for avoiding a criminal trial than the wrongful apprehension by private parties. See also *Pettibone* v. *Nichols*, 203 U.S. at 215 (rejecting the claim that *Ker* is inapplicable when the State "secured the presence of [the defendant] within its limits through a conspiracy on the part of its Governor and other officers").

[11] Although this Court has never departed from the *Ker-Frisbie* rule, the Second Circuit in *United States* v. *Toscanino*, 500 F.2d 267 (1974), stated that the Due Process Clause would bar a district court from assuming jurisdiction over a criminal case if the extreme torture, brutality, and kidnapping alleged in that case were established. The "*Toscanino* exception" to the *Ker-Frisbie* doctrine has never been accepted by this Court. It has been limited in the Second Circuit to cases of "shocking" and "egregious" conduct, see *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65-66, cert. denied, 421 U.S. 1001 (1975); *United States* v. *Lira*, 515 F.2d 68, 71, cert. de-

Those cases reflect a recognition that immunizing a defendant from all prosecution is too high a price to pay for an illegal arrest. The *Ker-Frisbie* doctrine and its rationale are fully applicable in this case.

2. *The Exception to the Ker-Frisbie Doctrine Extends Only to the Enforcement of Express Treaty or Statutory Provisions*

The court of appeals believed that, notwithstanding the *Ker-Frisbie* rule, it was authorized to imply the remedy of repatriation based on the claim made here of a treaty violation. See *Verdugo*, 939 F.2d at 1345-1348. That belief was unfounded. This Court has recognized an exception to the *Ker-Frisbie* doctrine only when the Court has found both a clear violation of a treaty or statute and a clear intention in the treaty or statute to provide for termination of the prosecution as a remedy. The decisions of this Court applying that exception to the *Ker-Frisbie* doctrine demonstrate that the exception is a narrow one and that respondent's case does not fall within it.

In *United States* v. *Rauscher*, 119 U.S. 407, 419-424 (1886), the Court held that a defendant who is formally extradited pursuant to a treaty request may not be prosecuted for an offense other than the one that formed the basis for his extradition. *Rauscher* was decided on the same day as *Ker*, and both decisions were authored by Justice Miller. Unlike *Ker*, *Rauscher* involved formal

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nied, 423 U.S. 847 (1975); and it has been rejected or questioned by other courts, see, *e.g.*, *Matta-Ballesteros* v. *Henman*, 896 F.2d 255, 262-263 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); *United States* v. *Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); *United States* v. *Herrera*, 504 F.2d 859 (5th Cir. 1974). In any event, the district court rejected respondent's *Toscanino* claim, and the court of appeals' holding was not premised on the Due Process Clause. The question of the validity of the "*Toscanino* exception" to the *Ker-Frisbie* rule is therefore not before this Court.

extradition proceedings.[12] The rule underlying the Court's holding, which has come to be known as the principle of specialty, see *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 523 (1988), was applied in light of specific terms in the Webster-Ashburton Treaty that required the presentation of evidence on the particular crime for which extradition was sought. The decision was also informed by the consistent prior practice of nations, which prohibited the prosecution of an extraditee on charges other than those that were made the subject of the extradition request. *Rauscher*, 119 U.S. at 419-424. Finally, the Court stated that "[i]f there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress * * * must set this question at rest." *Id.* at 423. The Court construed those statutes to provide that a defendant "shall not be * * * tried for any other offence than that with which he was charged in [the extradition] proceedings." *Id.* at 424.[13]

Nothing in *Rauscher* supports the conclusion that if the defendant's presence was obtained by means other than extradition, a court may invoke the treaty to refuse to try

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[12] The defendant was extradited from England under the Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, on charges of murder on the high seas; he was convicted, however, of inflicting cruel and unusual punishment, which was not an offense covered by the treaty. 119 U.S. at 409, 432.

[13] The Court cited Rev. Stat. § 5272, which authorized the Secretary of State to deliver a person who has been extradited "to be tried for the crime of which such person shall be so accused," and Rev. Stat. § 5275, which authorized the President to provide protection to a person extradited to this country "until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition." 119 U.S. at 423. Justice Gray concurred in *Rauscher* based solely on the fact that by enacting Rev. Stat. § 5275 "the political department of the government has clearly manifested its will, in the form of an express law * * * that the accused shall be tried only for the crime specified in the warrant of extradition." 119 U.S. at 433.

the defendant at all.[14] *Rauscher* requires only that a defendant's trial conform to the charges for which he was extradited, and its rule is limited to persons tried after a rendition pursuant to the treaty. In *Ker*, the Court explained that the holding of *Rauscher* did not help Ker because he (unlike Rauscher) was not delivered under the terms of an extradition treaty. 119 U.S. at 443. The line between *Rauscher* and *Ker* is clear, and respondent's case falls on the *Ker* side of the divide: respondent was not extradited under a treaty and therefore is "clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to [a foreign nation] or to him under the treaty." *Ker*, 119 U.S. at 443.

The court of appeals also relied on this Court's decisions in *Ford* v. *United States*, 273 U.S. 593 (1927), and *Cook* v. *United States*, 288 U.S. 102 (1933). Those cases, however, both concerned the Convention To Prevent Smuggling, Jan. 23, 1924, between the United States and Great Britain, 43 Stat. 1761, and the Court's analysis turned on the specific—and unusual—terms of that treaty. The 1924 treaty established explicit limitations on the right of the United States to seize a vessel and institute judicial proceedings to enforce the liquor smuggling laws. *Ford*, 273 U.S. at 608; *Cook*, 288 U.S. at 111.[15] In light

[14] None of the factors noted by *Rauscher* apply in this case. There is no language in our extradition treaty with Mexico that supports extension of the treaty's obligations to non-extradition settings. Moreover, *Rauscher* emphasized that its construction of extradition treaties "did not intend to depart * * * from the recognized public law which had prevailed in the absence of treaties." 119 U.S. at 420. The court of appeals' rule, by contrast, would sharply depart from the recognized principle that the right to try a defendant is not impaired by his forcible abduction. And, unlike in *Rauscher*, there is no federal statute authorizing a district court to refuse to hold a trial if it concludes that the defendant was forcibly apprehended abroad.

[15] The Convention was concluded during the Prohibition era in order to resolve a conflict between the United States and Great

of those terms, the Court construed the treaty to forbid "adjudication" by United States courts when jurisdiction was premised on a seizure that violated the treaty. The Court explained that the Convention specifically established "the conditions under which a 'vessel may be seized and taken into a port of the United States * * * *for adjudication* in accordance with' the applicable laws." 288 U.S. at 121 (quoting Convention, Art. II(2), 43 Stat. 1762 (emphasis added)); see also *Ford*, 273 U.S. at 606.

Ford and *Cook* stand for the proposition that when a treaty puts express limits on the adjudicative power of the courts, a defendant may assert the right not to be prosecuted if he is taken into custody in derogation of the treaty's provisions. *Ford*, 273 U.S. at 606; *Cook*, 288 U.S. at 121-122. But *Ford* and *Cook* do not suggest that *Ker* is inapplicable when the treaty at issue does not specifically limit the government's authority to prosecute the defendant.[16] Indeed, the Court in *Ford* indicated that a treaty could not affect the government's ability to bring criminal proceedings "unless the treaty affirmatively confers * * * immunity from prosecution." 273 U.S. at 611. As we discuss in detail below, nothing in our extradition treaty with Mexico "affirmatively" indicates that a defendant who has been forcibly abducted from that country is immune from prosecution in an American court. Yet if re-

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Britain over the seizure, outside of our territorial waters, of British vessels suspected of smuggling liquor. *Cook*, 288 U.S. at 112. In *Ford*, the Court indicated that *Ker* did not bar a claim raised under that treaty, but that the defendants had waived the point. In *Cook*, the Coast Guard seized the British flag vessel Mazel Tov at a point more than one hour's travel time from the coast of Massachusetts, in violation of the treaty, and the Court upheld the objection made to the ensuing judicial proceedings.

[16] Unlike extradition treaties, the treaty at issue in *Cook* and *Ford* was specifically intended to "deal completely with the subject of [extraterritorial] search and seizure," 288 U.S. at 112, and to "fix the conditions" for "adjudication" in this country following such a seizure, *id.* at 121.

spondent is repatriated to Mexico, he will acquire just such an immunity from prosecution.[17]

B. The Extradition Treaty With Mexico Does Not Prohibit Extraterritorial Arrests

Not only did the court of appeals err in finding that the *Ker-Frisbie* rule is inapplicable in respondent's case, it also erred in holding that the United States violated an implicit obligation in the extradition treaty with Mexico when United States officials sponsored respondent's abduction from Mexican territory. In fact, the extradition treaty does not address the subject of apprehensions made outside the extradition context, and the treaty cannot be construed to impose an obligation to refrain from such apprehensions.

Extradition treaties have a limited scope and function. Their purpose is to impose obligations on the contracting parties to surrender criminal fugitives. As this Court has noted, "[p]rior to these [extradition] treaties, and apart from them, * * * there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the gov-

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[17] Respondent is a Mexican national. Under Article 9(1) of the extradition treaty, the government of Mexico is under no obligation "to deliver up its own nationals," although it may do so if "in its discretion, it be deemed proper to do so." 31 U.S.T. 5065. Chapter I, Article 14 of the Mexican Law of International Extradition, however, provides that no Mexican national may be extradited to a foreign country except in exceptional cases in the discretion of the Executive. *Ley de Extradicion Internacional*, Capitulo I, Articulo 14, *published in Diario Oficial* (Dec. 29, 1975) ("Ningun mexicano podra ser entregado a un Estado extranjero sino en casos excepcionales a juicio del Ejecutivo."). To date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States. The United States has no reason to believe that, if respondent is repatriated to Mexico, the government of that country would return him to the United States under the treaty.

ernment whose action was invoked." *United States* v. *Rauscher*, 119 U.S. 407, 411-412 (1886); *Factor* v. *Laubenheimer*, 290 U.S. 276, 287 (1933) ("[P]rinciples of international law recognize no right to extradition apart from treaty."). Extradition treaties are therefore negotiated in order to provide the United States and its partners with a formal mechanism for acquiring custody of suspects located abroad. *United States ex rel. Donnelly* v. *Mulligan*, 74 F.2d 220, 222 (2d Cir. 1934); 1 *Restatement (Third) of the Foreign Relations Law of the United States* Pt. IV, subch. 7B, at 557 (1987); 1 L. Oppenheim, *International Law* § 328, at 404-405 (2d ed. 1912).[18]

Our treaty with Mexico was negotiated against that background. The present treaty, like its predecessors, formalizes the circumstances in which rendition by one nation is required in response to a request by the other.[19] There is no textual or historical basis for concluding that our extradition treaty with Mexico is intended to serve any other purpose. In particular, there is no evidence

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[18] As a matter of domestic law, extradition treaties are also necessary to give the government the authority to deliver persons to foreign countries for prosecution. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("There is no executive discretion to surrender [a person] to a foreign government, unless that discretion is granted by law. * * * It must be found that statute or treaty confers the power.").

[19] The negotiations leading to our nineteenth century extradition treaties with Mexico are recounted in 1 J. Moore, *Extradition and Interstate Rendition* § 81, at 95-97 (1891). The first treaty took effect in 1862, 12 Stat. 1199. Some of the issues that arose under that treaty are discussed in *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. at 13-16. A successor treaty was signed and ratified in 1899, 31 Stat. 1818, and supplemented by additional conventions in later years. The current treaty was signed on May 4, 1978, "as one of a series of modern extradition treaties being negotiated by the United States." *Message from the President Transmitting the Treaty of Extradition Between the United States of America and the United Mexican States*, Exec. M, 96th Cong., 1st Sess. (1979), and it entered into force on January 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656.

that the United States and Mexico intended to regulate forcible abductions by entering into the extradition treaty.

1. *The Text and Purpose of the Extradition Treaty Do Not Support the Court of Appeals' Construction*

a. There is no provision in our extradition treaty with Mexico that forbids the signatory nations from making extraterritorial arrests outside the context of extradition proceedings. The preamble to the treaty states that it was entered out of a "[d]esir[e] to cooperate more closely in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition." 31 U.S.T. 5061. In keeping with its stated objective to "render * * * assistance," the treaty speaks exclusively to formal extraditions that are requested by a nation under the treaty. The treaty first establishes an "Obligation to Extradite" in art. I, 31 U.S.T. 5061, and then describes the substance and procedure governing extradition obligations. Arts. 2-9, 31 U.S.T. 5062-5065 (substance); arts. 10-16, 31 U.S.T. 5066-5071 (procedure). In each case in which the treaty places a restriction on the parties' obligations, the restriction applies only when extradition is "requested," "sought," or "granted." See, *e.g.*, art. 5, 31 U.S.T. 5063-5064 (barring extraditions for political and military crimes); art. 6, 31 U.S.T. 5064 (incorporating double jeopardy principles); art. 7, 31 U.S.T. 5064-5065 (incorporating statute of limitations protections); art. 8, 31 U.S.T. 5065 (limiting extradition for capital offenses); art. 9, 31 U.S.T. 5065 (limiting obligation to extradite nationals). Similarly, the treaty contains a rule of specialty whose protection is specifically limited to "[a] person extradited under the present Treaty." Art. 17(1), 31 U.S.T. 5071. Nothing in the treaty speaks to the consequences of an apprehension that is made without a request for extradition.

While acknowledging that the treaty does not by its terms address extraterritorial arrests, the court of appeals held that its language indicated an intention to fore-

close such arrests. In particular, the court relied on the fact that some provisions of the treaty place limitations on the obligation to extradite, and it concluded that those provisions "only make sense if they are understood as *requiring* each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." *Verdugo*, 939 F.2d at 1351. But extradition treaties make perfect sense as fulfilling the far narrower aim of formalizing the circumstances under which the treaty partners are obligated to deliver up suspects for prosecution, and thereby facilitating the apprehension of fugitives. Like many international agreements, extradition treaties can be invoked to assist transactions between nations, but they do not forbid nations from pursuing national aims by other means. The court of appeals' inference that extradition treaty procedures are necessarily exclusive of other means of arrest was therefore unjustified by anything in the treaty's text.

In construing the treaty to impose implied obligations, the court ignored the cardinal principle that courts are not free to rewrite the international agreements to which this Nation is party. "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821). "[I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty * * * when * * * there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov* v. *United States*, 373 U.S. 49, 54 (1963); see *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134-135 (1989); *United States* v. *Stuart*, 489 U.S. 353, 371-373 (1989) (Scalia, J., concurring in the judgment). If the United States and Mexico had wished to address the issue of forcible abductions in the

extradition treaty, "it would have been very easy to have declared that purpose in unmistakable terms." *Rocca* v. *Thompson*, 223 U.S. 317, 332 (1912).

b. The court of appeals' analysis likewise finds no support in the general purposes served by extradition treaties. Relying on its belief that extradition treaties serve the purpose "of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals," the court of appeals proclaimed that extradition treaties "provide a comprehensive means of regulating the methods by which one nation may remove an individual from another nation for the purpose of subjecting him to criminal prosecution." *Verdugo*, 939 F.2d at 1350, 1355. From this, the court drew the inference that extradition treaties must be read to prohibit arrests outside a treaty's terms.

The court of appeals' conception of the general purposes of extradition treaties is incorrect. As leading authorities on extradition explain, extradition treaties are designed to facilitate the rendition of fugitives, without more.[20] Those treaties do not create territorial rights. Extradition treaties may be drafted on the assumption that, as a matter of international custom and principle,

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[20] For example, 1 J. Moore, *Extradition and Interstate Rendition* § 72, at 82 (1891), states that "[t]he objects of extradition treaties are: (1) To render the obligation to surrender certain; (2) to insure reciprocity; (3) to adapt the list of extraditable offences to the relative social and political conditions of the two countries; (4) to regulate procedure." Another authority notes that "the typical intentions of parties to extradition treaties had been described as being, firstly, the common interest of States in the punishment of offences which threaten the wellbeing of society and, secondly, the interest of the State into whose territory the criminal had come that he should not remain at large therein." Schwarzenberger, *The Problem of an International Criminal Law*, in 3 *Current Legal Problems* 272 (G. Keeton & G. Schwarzenberger ed. 1950). Those purposes give no indication that extradition treaties embody a comprehensive agreement between nations about when, if ever, an extraterritorial arrest can take place, and what remedies should follow if such an apprehension occurs.

each nation's territory is generally immune from intrusions by other nations' law enforcement personnel, but that is far different from viewing extradition treaties themselves as prohibiting such actions or creating an independent source of protection for territorial integrity.[21]

The argument that extradition treaties are intended to prescribe the mandatory and exclusive means for acquiring custody of fugitives is particularly ill-conceived in light of the common practice of nations voluntarily to deliver an individual to the United States for trial without a formal extradition request, and the uniform judicial view that such a consensual removal does not bar prosecution, even though extradition procedures were not followed.[22] There is no basis for viewing that settled prac-

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[21] The district court cited 1 M. Bassiouni, *International Extradition: United States Law and Practice*, ch. 5, § 2 at 194 (2d rev. ed. 1987), for the proposition that extradition treaties are "designed to protect the sovereignty and territorial integrity of states." Pet. App. 26a. In fact, Bassiouni was merely describing the conditions "[f]or abduction to be unlawful under [customary] international law"; elsewhere, his treatment of the history of extradition treaties supports the conventional view that extradition treaties were designed simply to facilitate renditions of fugitives. 1 M. Bassiouni, *supra*, ch. 1, § 2-3, at 10-24.

[22] See, *e.g.*, *United States* v. *Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (deportation); *United States* v. *Cordero*, 668 F.2d 32, 37 (1st Cir. 1982) ("nothing in these [extradition] treaties suggests that the countries involved *must* follow the extradition procedures set out in the treaties when they return criminal defendants to the United States"; rendition by deportation); *Stevenson* v. *United States*, 381 F.2d 142, 143-144 (9th Cir. 1967) (informal rendition by Mexican police); *Ex parte Campbell*, 1 F. Supp. 899 (S.D. Tex. 1932) (alleged joint kidnapping of defendant in Mexico by Mexican and United States officials). International precedents also establish that a nation may surrender a fugitive without complying with the requirements of an extradition treaty. See *Afouneh* v. *Attorney-General*, 4 Ann. Dig. 327, 327-328 (Palestine S. Ct. 1942) ("Where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner

tice as a "waiver" of treaty rights; rather, the practice of cooperative renditions through non-treaty means reveals the limited scope of extradition treaties: they address only the narrow issue of extradition procedures and the obligations of a signatory when the treaty is invoked.

c. Finally, the argument that extradition treaties are intended to govern the apprehension of fugitives both within and outside the context of formal extradition proceedings is at odds with the Court's construction of the extradition treaty at issue in *Ker* v. *Illinois*, *supra*. The Court rejected Ker's claim that his forcible abduction violated the obligations imposed by the extradition treaty with Peru, holding that nothing in the treaty guarantees asylum for fugitives in other countries. 119 U.S. at 442. To the contrary, the Court explained, "[t]he treaty, so far as it regulates the right of asylum at all, is intended to limit this right." *Ibid.* Under *Ker*, if an extradition treaty has not been "called into operation," "relied upon," or "made the pretext of arrest," the defendant's apprehension does not violate the treaty. *Id.* at 443.

That principle has become a basic premise underlying the negotiation, drafting, and interpretation of extradition treaties generally. It is telling that, although the United States is party to more than 100 extradition treaties, some of which are more than a century old, no decision has previously held that an extradition treaty prohibits arrests made outside the treaty terms.

2. *The Historical Background of the Extradition Treaty Does Not Support the Court of Appeals' Construction*

The history of relations between the United States and Mexico lends no support to the view that the treaty part-

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in which he was brought within the jurisdiction of the court."); *In re Károly R.*, 4 Ann. Dig. 345, 345-346 (Hungarian Minister of Justice 1928) ("There is no rule of public international law according to which courts of a State have no right to conduct criminal proceedings against an accused who returned from abroad by any means other than extradition.").

ners contemplated that the extradition treaty would bar the apprehension and prosecution of fugitives by any means other than through recourse to the treaty. Indeed, quite the contrary is the case. As early as 1906, the United States informed the government of Mexico that it did not regard the forcible abduction of a defendant from Mexico as a ground for the defendant to avoid a criminal trial in this country, specifically relying on *Ker* v. *Illinois*, *supra*.[23]

The courts took the same position. In *Ex parte Lopez*, 6 F. Supp. 342, 344 (S.D. Tex. 1934), the Mexican government sought to intervene in habeas corpus proceedings to contend that a person allegedly seized in Mexican territory should be returned to the custody of Mexico. Citing *Ker*, the court refused Mexico's request, explaining that

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[23] In 1905, Antonio Martinez was kidnapped from Mexico by Antonio Felix. On June 11, 1906, after the United States had granted Mexico's request for Felix's extradition, the Mexican chargé wrote to the Secretary of State to protest the fact that Martinez was undergoing a criminal trial in the United States. The chargé claimed that since the apprehension of Martinez was "in contravention of the lawful procedure established by the treaty between Mexico and the United States for the extradition of any fugitive from justice, * * * [Mexico] considers it self-evident that the action pending against the man can not rest [on] any legal foundation." Letter of Balbino Davalos to Secretary of State *reprinted in Papers Relating to the Foreign Relations of the United States*, H.R. Doc. No. 1, 59th Cong., 2d Sess., Pt. 2, at 1121 (1909). On June 22, 1906, Acting Secretary of State Robert Bacon rejected Mexico's request and informed Mexico that Martinez's trial could proceed. Bacon stated that "[t]he exact question presented in this case appears to have arisen in a case which came before the Supreme Court of the United States in 1886 (Illinois *v.* Ker) [*sic*]." Letter of Robert Bacon to Mexican Chargé, *reprinted in Papers Relating to the Foreign Relations of the United States*, H.R. Doc. No. 1, 59th Cong., 2d Sess., Pt. 2, at 1121-1122 (1909). After describing the facts and holding of *Ker*, Bacon concluded that "[i]t is not seen wherein the case of Martinez differs from that of Ker," and that the United States government was "unable to comply with the request of the Mexican Government for the release of Martinez." *Id.* at 1122.

the defendant's forcible removal from Mexico did not entitle him to be released, and that Mexico's protest of the alleged violation of its sovereignty must be addressed to the Department of State, not the courts. See also *United States* v. *Sobell*, 142 F. Supp. 515, 523-525 (S.D.N.Y. 1956), 244 F.2d 520, 524-525 (2d Cir.), cert. denied, 355 U.S. 873 (1957).

"The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States* v. *Stuart*, 489 U.S. at 369. The historical record in cases involving extraterritorial abductions is contrary to the court of appeals' interpretation of the treaty. The evidence thus falls woefully short of the compelling showing that would be required to imply the existence of a treaty obligation that the drafters did not express. See *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 13, 17 (1936) (concluding that "[h]istorical background and administrative practice furnish no warrant for reading into the treaty with France a grant [of the power to extradite nationals] which the parties failed to insert"; "the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied"),[24]

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[24] The sources cited by the court of appeals in *Verdugo* do not suggest otherwise. 939 F.2d at 1354. The court cited a letter written by Secretary of State James Blaine stating that the extradition treaty with Mexico "does not authorize either party, for any cause, to deviate from [its] forms or arbitrarily abduct from the territory of one party a person charged with crime, for trial within the jurisdiction of the other." *Ibid.*, quoting Letter to O.M. Roberts, Governor of Texas (May 3, 1881, *reprinted in Domestic Letters of the Department of State, 1784-1906* (National Archives Microfilm Publication M40, Roll 93). That letter, however, was written well before this Court's decision in *Ker*. Moreover, the letter was sent not to Mexico, but to a state governor urging him not to seize persons from Mexico for prosecution; it did not suggest that the treaty authorized a judicial remedy for

More generally, the *Ker* rule has been consistently followed in American courts and has been "widely applied throughout the world." *United States* v. *Cordero*, 668 F.2d 32, 36 (1st Cir. 1982).[25] In light of that record, it

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forcible abductions. The court also cited a letter written by Secetary of State George Shultz to the Florida Probation and Parole Commission to advocate early parole for a prisoner abducted from Canada by bounty hunters, an act that Canada viewed as a violation of the extradition treaty. 939 F.2d at 1354. Secretary Shulz's letter was premised on the view that the extradition treaty "could have been utilized to secure" the defendant's return, and that there was "no good reason" for failing to use it—not on the view that renditions or apprehensions without extradition are strictly barred by the terms of the treaty. *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l L. 200, 208 (1984). Finally, the court misconstrued a statement made in congressional hearings by Abraham D. Sofaer, former State Department Legal Adviser. 939 F.2d at 1354. The statement specifically noted that under *Frisbie*, the nature of a seizure does not bar prosecution in this country; it indicated only that other nations (not, as the court of appeals implied, the United States) might view an extraterritorial seizure as "incompatible with any bilateral extradition treaty in force." *Hearing on S. 1373, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 69 (1986).

[25] See, *e.g.*, *Ex parte Elliott*, 1 All E.R. 373, 376 (K.B. 1949) (alleged unlawful arrest by British officers in Belgium did not oust British court of jurisdiction to try the defendant); *Attorney General* v. *Eichmann*, 36 I.L.R. 277, 305 (S. Ct. Israel 1962) ("[E]ven if [an extradition] agreement existed between the two countries but the offender was not extradited to the first country in accordance therewith—the Court will not investigate the circumstances in which he was detained and brought into the area of jurisdiction."); Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l L. 502, 505 n.15 (1935) ("In Germany, as in the United States, it appears that an individual cannot plead his illegal arrest as a bar to prosecution."); 1 M. Bassiouni, *supra*, ch. 5, § 2, at 191-194. The only cases of which we are aware that have refused to apply that doctrine are two decisions by lower French tribunals. See *In re Jolis*, 7 Ann. Dig. 191 (Tribunal Correctionel D'Avesnes 1933) (illegal arrest by French officials in Belgian territory could not support custody of the defendant);

is inconceivable that the President would have negotiated a treaty that overturns *Ker* and then submitted that treaty to Congress without any mention of the issue. Yet there is no evidence that the question was raised in negotiations leading to our extradition treaties with Mexico. Nor did the President's statement transmitting to Congress our most recent extradition treaty with Mexico refer to forcible abductions. *Message from the President Transmitting the Treaty of Extradition Between the United States of America and the United Mexican States*, Exec. M, 96th Cong., 1st Sess. (1979). Finally, the Executive Branch is firmly opposed to a reading of our extradition treaties that would allow a criminal defendant who was apprehended without an extradition request to claim that his arrest violated the treaty.[26] Against that background, the court of appeals erred in finding that our extradition treaty with Mexico embodies a rule prohibiting apprehensions that do not involve a treaty request at all.

Matter of Nollet, Journal du Droit Int'l 1188 (Cour d'appel de Douai 1891) (same). More recent French authority, however, has rejected the contention that an illegal abduction from abroad nullifies a prosecution in France. *Re Argoud*, 45 I.L.R. 90, 95-97 (Court of Cassation 1964) (extradition treaty applies only to a person for whom extradition was requested; assuming there was any violation of Germany's sovereignty in the abduction of the defendant from that country by unknown persons, "[t]he accused has no capacity to plead a contravention of the rules of public international law and could not claim to find in them a personal basis for immunity from judicial proceedings").

[26] In connection with this case, the Department of State's Legal Adviser expressed the Executive Branch's view that extradition treaties do not address the issue of forcible abductions and do not give rise to any remedies in such a case to be administered by courts. Gov't C.A. Addendum 68-72. "[A]lthough not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight." *United States* v. *Stuart*, 489 U.S. at 369, quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).

3. *Sources of International Law Do Not Support the Court of Appeals' Construction of the Extradition Treaty*

The court of appeals found support for its construction of the extradition treaty in sources of international law. The court relied, for example, on Article 2(4) of the United Nations Charter, June 26, 1945, 59 Stat. 1037, T.S. No. 993, which provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." In addition, the court relied on Article 20 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, which provides that "[t]he territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly on any grounds whatever." See *Verdugo*, 939 F.2d at 1352.

Far from supporting the court's analysis, those sources of international law confirm that the extradition treaty between the United States and Mexico does not address the issue of extraterritorial arrests. The international compacts on which the court relied make explicit the rights and duties of signatory nations. It is through those general treaties, not through the much more specialized device of extradition treaties, that nations express their recognition of each others' territorial integrity.

Moreover, it is well established that the international charters that deal with the use of force within the borders of other nations do not create rights enforceable by private individuals in court. Efforts to enforce provisions of the United Nations Charter and similar multilateral trea-

ties in federal courts have been repeatedly rebuffed.[27] And it has been settled since the early years of this Nation that even if a seizure within another nation's territory is deemed to violate customary international law, the violation does not give rise to enforceable rights in domestic judicial proceedings.[28] In light of the courts' re-

[27] The Constitution provides that "[t]his Constitution, and the Laws of the United States * * * and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Art. VI, Cl. 2. As a matter of domestic enforceability, however, it has long been recognized that treaties may be "executory" in the sense that they do not give rise to legal rights without implementing legislation. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598 (1884). Numerous decisions have rejected the proposition that general multilateral treaties like the United Nations Charter are "self-executing" sources of law in federal proceedings. *See, e.g., Committee of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) ("Article 94 of the U.N. Charter [addressing the enforceability of judgments of the International Court of Justice] simply does not confer rights on private individuals."); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373-374 & n.5 (7th Cir. 1985) (canvassing cases and finding that none concludes that the United Nations Charter is self-executing, while "quite a few decisions stat[e] that the Charter is not self-executing"); *United States* v. *Postal*, 589 F.2d 862, 873-884 (5th Cir.) (high seas treaty not self-executing), cert. denied, 444 U.S. 832 (1979); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); Pet. App. 38a-39a & n.24 (collecting cases indicating that United Nations Charter and the Charter of the Organization of American States "are not enforceable in federal courts absent implementing legislation").

[28] *See The Ship Richmond* v. *United States*, 13 U.S. (9 Cranch) 102, 104 (1815) ("The seizure of an American vessel within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This Court can take no cognizance of it; and the majority of the Court is of the opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the District Court, so as to annul the proceedings of that Court against the vessel"); *The*

fusal to enforce international norms that explicitly address the issue of territorial rights, it would be quite anomalous for courts to discover in extradition treaties an implicit prohibition of extraterritorial arrests that is judicially enforceable at the behest of a private individual.

C. Respondent Does Not Have Standing to Raise The Asserted Violation of the Extradition Treaty

Even assuming—contrary to the treaty's text, purpose, and historical background—that an extraterritorial arrest violates our extradition treaty with Mexico, an individual defendant has no right to raise such a treaty violation as a defense to criminal prosecution. The treaty, construed in light of familiar principles of interpretation, gives no such right. Moreover, to permit a defendant to object to an extraterritorial arrest in a criminal case would generate needless friction with the role of the Executive Branch to conduct foreign affairs.

1. *Absent a Clear Indication to the Contrary, Treaties Are Not Enforceable by Individuals*

The determination whether an individual may enforce a treaty in court must start from the premise that

> [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884). Although there are exceptions, "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." 2 *Restatement*, *supra*, at § 907

Merino, 22 U.S. (9 Wheat.) 391, 402-403 (1824); 1 *Restatement*, *supra*, § 433(2) and comment b, at 333-334.

comment a, at 395. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) ("These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.") (footnote omitted); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 30 (2d Cir.) ("even where a treaty is self-executing, Federal jurisdiction * * * will not lie where it is not provided for in the treaty"), cert. denied, 429 U.S. 835 (1976).

There is nothing in the extradition treaty with Mexico that confers rights on a defendant in respondent's position. Nor would the implication of such rights have any sound basis.[29] Indeed, it would be particularly strange to imply a private right to avoid all criminal prosecution under an extradition treaty, because the treaty is designed, not to establish individual rights, but to articulate a framework for international cooperation in law enforcement.[30] As we have noted above, the *Ker-Frisbie* rule is a recognized feature of both domestic and international law, and the extradition treaty was negotiated in light of this country's consistent adherence to it. If a major departure from that rule is to be created, it should not be done without express language requiring that result.

The court of appeals accorded respondent standing to raise the alleged treaty violation on the ground that the government of Mexico has protested his abduction. Mexi-

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[29] If anything, courts should require a far more convincing showing before reading private rights into a treaty than into a statute. A treaty is primarily addressed to the rights of nations, and foreign governments are competent to protect their own interests.

[30] *Rauscher* is not to the contrary. Not only are the central factors that led the Court in *Rauscher* to imply a privately enforceable rule of specialty absent from this case, see note 14, *supra*, but the remedy of repatriation—which bars *all* prosecution in this country—is far more drastic than the remedy in *Rauscher*—which simply limits prosecution to the terms of the extradition grant.

co's protest, however, is irrelevant to the issue of respondent's standing. The treaty nowhere states that a protest by one nation entitles an individual to assert a treaty violation. To allow that result in this case would be highly incongruous, since it would make the jurisdiction of the federal courts turn on the diplomatic posture of a foreign nation at a particular time. In this case, for example, if Mexico were to withdraw its note of protest, the court of appeals' rationale requires that the district court would thereby regain jurisdiction over respondent and be entitled to try the case. *Verdugo*, 939 F.2d at 1361-1362.

It would be unprecedented to hold that a note addressed to the United States Department of State from the government of Mexico—or a letter addressed to a court from a Mexican consular official (see J.A. 67-71)—confers standing on a defendant to litigate a treaty violation in a United States court. Respondent is not empowered to speak on Mexico's behalf and is hardly a surrogate for that nation. Whatever rights Mexico has under the treaty cannot be delegated to a criminal defendant seeking to avoid trial in this country.

If Mexico believes that its interests require a protest over an arrest from within its territory, it can pursue the matter through diplomatic channels. That is the traditional remedy for a government to object to another country's apprehension of a fugitive from within its borders. See *United States* v. *Unverzagt*, 299 F. 1015, 1017 (W.D. Wash. 1924) (citizen of United States, allegedly abducted from Canada, had no right to resist trial; "if Canada or British Columbia desire to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels. The defendant cannot before the court invoke the right of asylum in British Columbia."), aff'd *sub nom. Unverzagt* v. *Benn*, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 56 (1925); *Ex parte Lopez*, 6 F. Supp. at 344 ("The intervention of the government of Mexico raises serious questions, involv-

ing the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this court has no jurisdiction."); *State* v. *Brewster*, 7 Vt. at 121-122. History is replete with examples of diplomatic resolutions of protests over extraterritorial arrests.[31] There is no reason to construe the extradition treaty in this case to sanction a wholesale departure from the normal mode of diplomatic procedure for resolving such disputes.

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[31] Perhaps the most famous case involved the apprehension of Adolf Eichmann from the territory of Argentina. Argentina lodged a complaint against Israel with the United Nations Security Council, which that body addressed on June 23, 1960, by declaring that the "violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations," and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law." On August 3, 1960, the two countries issued a joint communiqué stating:

> The Governments of Argentina and Israel, animated by a desire to give effect to the resolution of the Security Council of June 23, 1960, in so far as the hope was expressed that the traditionally friendly relations between the two countries will be advanced, resolve to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina.

Attorney General v. *Eichmann*, 36 I.L.R. 5, 58-59 (Dist. Jerusalem 1961), aff'd, 36 I.L.R. 277, 305 (S. Ct. Israel 1962). See also *The Casablanca Case* (May 22, 1909) (France and Germany arbitrated whether French military officials had lawfully arrested military deserters who sought sanctuary in the custody of the German consul), *reprinted in Hague Court Reports* 110 (Scott ed. 1916); *The Savarkar Case* (Feb. 24, 1911) (France and Great Britain arbitrated whether France was entitled to the restitution of a British-Indian fugitive who had eluded British custody while on a ship docked in Marseilles and had been returned to British authorities by a French policeman), *reprinted in Hague Court Reports* 275 (Scott ed. 1916); 4 J. Moore, *A Digest of International Law* § 603, at 328-332 (collecting numerous examples), in H. Doc. 551, 56th Cong., 2d Sess. (1906).

2. *Permitting Respondent To Raise the Alleged Treaty Violation in Court Would Interfere with the Executive Branch's Authority over International Relations*

If respondent were to be granted standing based on Mexico's protest, it would raise many of the concerns that underlie the political question doctrine. The adjudication of claims challenging foreign arrests would frequently encroach on functions belonging exclusively to the political branches.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to * * * Congress or * * * the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986). The doctrine applies when there is "a textually demonstrable constitutional commitment of the issue to a coordinate" branch of government; when there is a "lack of judicially discoverable and manageable standards for resolving" the issue; or when the case requires "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). The danger of embroiling the judiciary in foreign affairs is a classic reason for applying the political question doctrine. See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). In this case, three considerations underscore the political question concerns that would be raised by giving respondent a right to object to his trial based on Mexico's protest.

First, receiving and replying to communications from a foreign government is a task committed to the President, not the courts. The Constitution provides that the President "shall receive Ambassadors and other public Ministers." Const. Art. II, § 3. It is for the President to gauge the meaning and gravity of objections by foreign governments to this country's conduct abroad and to frame this country's response to those objections. *Ex parte Peru*, 318 U.S. 578, 586-587 (1943). In carrying

out that role, the President has means of acquiring information concerning the intentions of foreign powers that the courts manifestly lack. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). Yet the court of appeals' rule makes it a threshold task for judges to receive and weigh diplomatic communications addressed to the Department of State. Courts are not equipped or empowered to carry on a diplomatic dialogue with other nations, or to interpret a diplomatic statement in isolation from the web of communications on a wide range of issues that characterizes the interaction between nations.

Second, the remedy of repatriation devised by the court of appeals cuts deeply into the government's authority to formulate this Nation's response to the claim of an unlawful apprehension. No provision of law grants to the courts the extraordinary power to repatriate a person. The court of appeals' assertion of that power is inconsistent with the generally limited function of the Article III branch in the realm of foreign relations. See *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). Nor does the role of the judiciary in administering extradition requests justify the invention of a court-made repatriation remedy in this context. Courts have never possessed the authority to surrender a person to a foreign land, even upon a determination that an extradition request is legally sufficient. The Secretary of State makes the final decision whether to extradite an individual and has the unreviewable discretion not to do so.[32] That provision underscores the point that the administration of extradition treaties is inter-

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[32] See 18 U.S.C. 3186 (authorizing, but not compelling, the Secretary of State to surrender a fugitive upon a judicial finding that the fugitive is extraditable); *Collier* v. *Vaccaro*, 51 F.2d 17, 20-21 (4th Cir. 1931); S. Spear, *Law of Extradition* 223-224 (1879). Other provisions of law vest the Attorney General with plenary authority to regulate the deportation or exclusion of aliens. See 8 U.S.C. 1101 *et seq.* The role of the courts in such matters is extremely limited. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

woven with the Executive's authority to conduct foreign relations in accordance with overall national interests. It would be anomalous to hold that, in the present context, courts have the unique and unreviewable right to remedy a perceived treaty violation by requiring repatriation.

Third, the determination of whether an extradition treaty violation should take precedence over the Nation's interest in enforcing our criminal laws is a policy judgment that is not for the courts to make. Cf. *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889) ("The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."). The court of appeals' inflexible rule would restrict the government's law enforcement options in a particularly critical context. Under the court of appeals' approach, violators of United States law may acquire effective immunity from prosecution by seeking refuge in a nation that has signed an extradition treaty with the United States, but that is unable or unwilling to cooperate in bringing those persons to trial.[33] The court of appeals' ruling thus gives unwarranted sanctuary to foreign fugitives no matter how pressing the need to enforce our criminal laws. In the absence of a treaty provision requiring that result, it is wholly unjustified for the courts to compel it. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

A decision to apprehend a foreign national abroad, without the consent of the nation involved, raises difficult

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[33] The United States has established a broad network of extradition treaties with other nations. But "[w]hile many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups." *FBI Authority To Seize Suspects Abroad: Hearing Before Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989) (testimony of Assistant Attorney Gen. William P. Barr).

policy issues with international ramifications. The need to weigh such policy considerations, however, underscores the unsuitability of those issues for judicial resolution. To read into extradition treaties implied rights and remedies and then license individual defendants to invoke those rights based on a foreign government's protest is an unsound use of judicial power. There is no provision of law that suggests that Congress envisioned that courts could free a defendant because the United States commissioned his extraterritorial arrest. By assuming the authority to reach that result, the court of appeals' decision improperly transfers to the judiciary policy judgments that belong to the political branches of government.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45314

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

No. 91-712

IN THE
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OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT HUMBERTO ALVAREZ-MACHAIN

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QUESTION PRESENTED

Whether the federal courts may try a Mexican national kidnapped in Mexico by agents of the Drug Enforcement Administration in violation of the Extradition Treaty between the United States and Mexico, after unequivocal and repeated protests by Mexico and a formal demand for his repatriation.

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No. 91-712

IN THE

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BRIEF FOR RESPONDENT HUMBERTO ALVAREZ-MACHAIN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 946 F.2d 1466. The opinion of the district court (Pet.App. 4a-41a) is reported at 745 F.Supp. 599.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

TREATY INVOLVED

The extradition treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, is reprinted at J.A. 72-87 (the "Treaty").

STATEMENT

Respondent Humberto Alvarez-Machain is a Mexican citizen and a doctor residing in Guadalajara, Mexico. In April 1990 he was forcibly kidnapped by agents of the U.S. Drug Enforcement Administration (DEA) in his medical office and forcibly transported to Texas where he was taken into custody by waiting DEA officials. Respondent was charged in a sixth superseding indictment returned on January 31, 1990, with five counts relating to the kidnapping and murder of DEA Special Agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar. Dr. Alvarez-Machain, who has never been arrested before for any criminal offense, has consistently denied these allegations and maintains his innocence of these charges.

In the district court, DEA agents testified that in late 1989 and early 1990 they had contacts with persons they presumed were representing the Mexican Attorney General concerning Respondent's surrender. (Pet. Br. 2-3.) By January 1990, these DEA officials believed that they were being "set up" by their Mexican contacts and terminated the discussions. (Pet. Br. 3.) Instead, these low-level DEA officials turned to an informant, Antonio Garate-

Bustamante, and his "associates" to obtain Respondent by force without the consent of the Mexican government. (*Id.*)

There is no evidence in the record that Respondent's kidnapping was authorized by any high level official of the U.S. government. Nor has the United States initiated a request for Respondent's extradition or prosecution under the Treaty.

Mexico has vigorously protested the abduction of Dr. Alvarez-Machain throughout these proceedings (J.A. 33, 35, 67) and has never wavered from its position that Respondent's kidnapping was a violation of the Treaty and has insisted on his return to Mexico. Mexico has also stated at all times that it will honor its obligations under the Treaty with respect to Respondent. (J.A. 70-71).

On May 10, 1990, Respondent filed a motion to dismiss the indictment on the grounds of outrageous government conduct and lack of personal and subject matter jurisdiction. (Pet. App. 5a.) After an evidentiary hearing on May 25, 1990, the district court issued a memorandum order and opinion on August 10, 1990, (Pet. App. 4a-41a), in which it found that it lacked personal jurisdiction over Respondent because of the violation of the extradition treaty between the United States and Mexico. The district court ordered the government to discharge Dr. Alvarez-Machain and to repatriate him to Mexico. (Pet. App. 37a). The district court found that Respondent's abduction from Mexico was orchestrated by the DEA and its agents after negotiations with Mexican officials had broken down. (Pet. App. 24a-25a). The government has never challenged these findings in these proceedings and does not challenge them in this Court. The Ninth Circuit affirmed the district court's judgment on the authority of *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), Petition for Cert. pending, No. 91-670.

SUMMARY OF ARGUMENT

This is a case of first impression. Underlying the government's argument are two unprecedented propositions: (1) that its forcible abduction of a foreign national from his homeland, over the unequivocal protests of his government, does not violate the United States' obligations under an existing extradition treaty; and (2) that, even if it did, an individual injured by such lawless conduct could not raise this treaty violation before a court. The first distorts the clear meaning of the Treaty and makes a mockery of its purpose. The second subverts the role of treaties under the Constitution and raises the anomaly of rights without remedies.

I. The extradition treaty between Mexico and the United States provides a comprehensive and mutual framework for the rendition of persons found within their respective territories and charged with crimes specified in the Treaty itself. By its terms, the Treaty "shall apply" to the offenses for which Respondent has been charged. Article 9 of the Treaty pointedly protects the right of each party not to extradite its own citizens but to prosecute them domestically instead. Under this carefully negotiated protection afforded to both Mexican and U.S. nationals, there is no prospect of "immunity from prosecution" as the government ominously suggests. Accordingly, this case is not about whether Respondent will face the charges against him. It is only about where, by virtue of Article 9, he will stand trial.

The conclusion that the Treaty prohibits the abduction of foreign nationals from foreign territory is reinforced by its history and purpose, as well as the customary prohibition under international law on extraterritorial exercises of a state's police power. Although it is clear that the requested state can cooperate implicitly or explicitly in informal

renditions outside the Treaty framework, it hardly follows -- as the government argues -- that the requesting state can view the Treaty as optional. To the contrary, the Treaty is designed to assure mutual cooperation in the rendition of suspects and respect for national sovereignty. The United States violated the Treaty when it unilaterally circumvented this process.

II. Under *United States v. Rauscher*, 119 U.S. 407 (1886), the Treaty violation deprives the district court of jurisdiction over the defendant. This Court has consistently held that a federal court's authority is limited by the treaty obligations of the United States and will be defeated by the government's violation of express or implied provisions in those treaties.

The Treaty violation, evidenced by Mexico's on-going protest, distinguishes the authority invoked by the government. Relying on *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), the government argues that immunity from prosecution is not to be implied as a remedy for an illegal arrest. But no case involving the *Ker-Frisbie* doctrine has involved the violation of an extradition treaty, and *Ker* itself is premised on the absence of a treaty violation. *Frisbie*, involving only an interstate abduction, is utterly irrelevant to these proceedings. The rationale for the *Ker-Frisbie* doctrine -- that of assuring that the means of bringing the defendant before the court will not immunize him from prosecution -- is inapplicable in this case since, as noted, the issue is where and not whether Respondent will face charges.

The government is forced to construe *Rauscher* as an exception to the *Ker-Frisbie* doctrine. But *Rauscher* and *Ker* were decided on the same day, and they can be reconciled easily by understanding the distinctive setting in which each operates: *Rauscher* where there has been a violation of a treaty's express or implied provisions and *Ker* where there

has not. The court of appeals rightly placed this case in the *Rauscher* line.

The government's justiciability arguments are equally unpersuasive. Respondent clearly has standing to challenge the legality of these proceedings. This Court has long recognized that extradition treaties are inherently self-executing and are thus enforceable by individuals injured by their violation, regardless of whether the treaty itself provides measures for its domestic enforcement and regardless of whether the specific treaty term is explicit or implicit.

III. The court of appeals correctly concluded that repatriation was the appropriate remedy. Under both domestic and international law, repatriation is a familiar and accepted form of redress for violations of treaties or other international obligations.

IV. Nor is Respondent barred by the political question doctrine from invoking the Treaty in his own defense or in seeking repatriation. This case requires only that the court fulfill its traditional function of interpreting and enforcing the treaties of the United States as the "Supreme Law of the Land." The political question doctrine is especially inappropriate because the government itself has involved the judiciary by seeking to try Respondent and have the courts authorize his imprisonment. Having chosen to rely on the courts, the government may not at the same time prevent the courts from determining the lawfulness of their own jurisdiction or from assuring that they are not themselves complicit in a continuing violation of the Treaty.

Reversing the decision of the court of appeals would be an invitation to lawless conduct by low-level U.S. officials and pave the way for similar conduct by foreign countries against U.S. nationals.

Respondent respectfully urges this Court to reject the stunning propositions that one state's abduction of a foreign national over the protest of the territorial state can be consistent with an extradition treaty in force, and that the individual injured by such action is powerless to challenge it.

ARGUMENT

I. RESPONDENT'S FORCIBLE ABDUCTION BY U.S. AGENTS VIOLATES THE TREATY.

The lower courts interpreted the Treaty to find an implicit prohibition of the unilateral abduction of Mexican nationals from Mexican territory by U.S. agents, in the absence of acquiescence or consent by Mexico. That conclusion, which is limited in scope and unexceptional, is supported by the text, history and purpose of the Treaty, as well as the international law context in which it was drafted.

A. The Text, Structure, Purpose and Object of the Treaty Preclude Unilateral Abductions.

The starting point for analysis of the question presented is "the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 397 (1985). The Treaty sets forth a comprehensive framework within which criminal suspects will be rendered, in the absence of informal agreements or cooperation, from one country to the other. (J.A. 72). The Treaty's object and purpose, stated explicitly in its preamble, was "*to cooperate more closely* in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition" *Id.* (emphasis added).

By the terms of Article 22, labeled "Scope of Application," the Treaty "*shall* apply to offenses specified in Article 2 committed before and after this Treaty enters into force." Art. 22(1) (emphasis supplied). Article 2 in turn, captioned "Extraditable Offenses," refers to "willful acts which fall within any of the clauses of the Appendix [including murder and kidnapping]...." Art. 2(1). The plain import of these provisions is that charges specified in Article 2 -- like those filed against Respondent -- fall within the Treaty's mandatory reach. Analogous language in the Hague Service Convention was held mandatory in *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 699 (1988).[1]

Other provisions further discredit the Government's portrayal of the Treaty as inapplicable to the circumstances of this case. Under Article 1, the parties agree to mutually extradite persons covered by the terms of the Treaty, including those accused of kidnapping. Article 1(2) specifically governs the delivery of persons "for an offense committed outside the territory of the requesting party." The Treaty imposes a wide variety of limitations on the obligations to extradite and on the duties of the requesting party once extradition is granted under the Treaty.[2]

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[1]In *Schlunk*, the Court went on to find that the service on a foreign parent through its wholly-owned U.S. subsidiary was not service "abroad" within the meaning of the Convention. 486 U.S. at 707-08. But there is no analogous text in the Extradition Treaty that can be interpreted to allow extraterritorial abduction of foreign nationals by the government, as occurred in this case.

[2]For example, extradition will not be granted for "political" offenses (Article 5(1)), for "purely military" offenses (Article 5(3)), when the person has been tried for the offense by the requested party (Article 6), or if the offense is barred by lapse

These limitations on the rendition of nationals and the mandatory language in which they are framed make the government's arguments in this case implausible. Clearly, Mexico and the United States did not create an extradition treaty, with a carefully-negotiated package of limitations and procedural protections, only to allow either party to circumvent it at whim by abducting a suspect from the other's territory.

A critical provision for the purposes of this case is Article 9, which reflects an agreement between the United States and Mexico protecting the right of each party not to have its nationals prosecuted in the other country, so long as the case is submitted for prosecution if extradition is denied. Article 9 provides:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

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of time (Article 7). (J.A. 74-75). Article 8 permits extradition to be refused absent assurances that the death penalty will not be imposed or executed. There would be no point to these limitations if they could be bypassed by state-sponsored abduction.

Such a restriction in Article 9 reflects an agreement between the two contracting sovereigns: Each nation is given the right to insist that charges be brought against a national of the other, in exchange for that nation's right to choose where such proceedings will be instituted.[3]

The U.S. government was fully aware of the nature of the agreement reached in Article 9 of the Treaty, although it inexplicably ignores paragraph 2 of Article 9 altogether in its brief. The Presidential Message accompanying the Treaty expressly recognized that:

> The new U.S.-Mexico treaty would permit the U.S. to extradite its own citizens, as does the old treaty. Mexican law, however, prohibits the extradition of Mexican nationals. The treaty thus obliges the requested state, *if it does not extradite its own nationals, to submit the case to its competent authorities for a decision as to prosecution, provided that state has jurisdiction over the offense.*

Presidential Message, Extradition Treaty Between the United States and Mexico--Changes in the New Treaty at 19 (emphasis added). Thus, the United States understood from the outset that Mexico has the right under the Treaty to insist that Respondent be tried in Mexico and *not* in the United States.

The United States-Mexico Treaty is one of a small number of extradition treaties to which the United States

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[3]*See generally*, Shearer, EXTRADITION IN INTERNATIONAL LAW 94-118 (1971).

is a party which include such an obligation.[4] Mexico has consistently affirmed its willingness to abide by its obligations to submit the case against Respondent for prosecution under Article 9(2), (J.A. 70-71), and the government of the United States does not dispute the sincerity of this representation. Thus, an extradition request in this case would not be futile; the United States would get exactly what it bargained for.

Viewing forcible abduction of Mexican nationals as a viable alternative to extradition proceedings, the government completely undermines the basic purpose of the Treaty by unilaterally altering the terms of its agreement with Mexico. Under basic rules governing treaty interpretation, this cannot be done. *See, e.g., New York Indians v. United States,* 170 U.S. 1, 23 (1898).

Moreover, the Treaty cannot be explained simply as an optional tool to be used only when the parties agree on the rendition of a fugitive. Petitioner provides a strained and unconvincing rationale for the negotiation of extradition treaties as emanating solely from a desire by states to impose additional obligations upon themselves to render up fugitives to requesting foreign governments (Pet. Br. 21).

But, a primary motivation governments have in negotiating extradition treaties is their desire to acquire a legal basis to *demand* the rendition of fugitives. Moreover, it is precisely because abduction of criminal suspects from another country is so clearly prohibited in international law, and because there is no international duty to extradite absent a treaty, that extradition treaties are necessary.

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[4]The U.S. extradition treaties which have provisions similar to Article 9 are with Argentina, Costa Rica, Denmark, Finland, Germany, Jamaica, Norway, Paraguay, Sweden, Thailand and Turkey.

Where Mexico and the United States agree to render criminal suspects informally, the Treaty provisions are, of course, superfluous.[5] It is only and precisely when such informal agreements are not possible that the Treaty is required and comprehensively governs the manner in which suspects may be rendered. In these circumstances, the carefully-negotiated limitations apply.[6]

Significantly, the Treaty is reciprocal, and protects all Americans from abduction just as it does Mexicans. The government's reading is all the more implausible and

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[5]States may rely on other sovereign powers to consent to the informal rendition of a criminal suspect. *See, e.g., United States v. Sobell,* 244 F.2d 520, 524-25 (2d Cir.), *cert. den.*, 355 U.S. 873 (1957) (no Mexican protest to abduction in Mexico by Mexican Security Police of U.S. citizen charged by the U.S. Government with espionage); *see also Stevenson v. United States,* 381 F.2d 142, 144 (9th Cir. 1967) ("The appellants were deported by Mexican immigration authorities as undesirable aliens found in Mexico under suspicious circumstances.").

[6]The government claims that the Treaty is "not a general compact for the protection of territorial rights." (Pet. Br. 9). Respondent does not argue to the contrary. However, the Treaty does recognize certain territorial rights. For example, Article 4 of the Treaty specifically recognizes the territorial jurisdiction of the states parties in the implementation of the Treaty. Concerns relating to territorial sovereignty are also explicitly referred to in Article 20, Section 2, which provides that "the authorities of the Transit State shall be in charge of the custody of the extradited person while that person is in its territory." The Treaty would become meaningless if the underlying premise of mutual respect for the territorial sovereignty of both countries were ignored in the rendition of criminal suspects.

troubling, since it would allow Mexico to forcibly abduct Americans from United States territory, without requesting extradition. *Cf. Boos v. Barry*, 485 U.S. 312, 323 (1988) (considerations of reciprocity enhance importance of complying with international obligations).

B. The Historical Background of the Treaty Supports The Interpretation Urged by the Government of Mexico and Respondent.

The United States and Mexico have entered into a series of extradition treaties dating back to 1862. Thus for 130 years the United States and Mexico have found it important to have a treaty governing the exchange of criminal suspects.[7] In that time, the United States government has never, until this case, asserted the right to abduct Mexican citizens from the territory of Mexico without Mexico's consent.[8]

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[7]Significantly, the United States has no extradition treaty with many countries. This category includes Libya, Syria, Iran, Lebanon, Jordan, Yemen, Tunisia, Algeria, North Korea, the Peoples Republic of China, Viet Nam, Afghanistan, Kampuchea, Kuwait, Morocco, Ethiopia, Somalia, Sudan, and Mozambique. Abductions of the nationals of these countries, for example in the context of persons sought for terrorist attacks on U.S. citizens abroad, would present legal issues distinct from the issues presented in this case.

[8]Some of the early history of this treaty is recounted in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11-17 (1936). Indeed, under the first extradition treaty with Mexico, Secretary of State Blaine came to the conclusion that the United States was precluded from requesting the surrender of Mexican citizens under the treaty. (*Id.* at 16).

Indeed, the understanding from the early days of extradition treaties between the United States and Mexico was that unconsented abduction was not an acceptable alternative to extradition. Secretary of State James Blaine emphasized in 1881 that "[t]he treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any case, to deviate from those forms or arbitrarily abduct from the territory of one party a person charged with crime, for trial within the jurisdiction of the other." Letter of Secretary of State James Blaine to O.R. Roberts, Governor of Texas (May 3, 1881), in *Domestic Letters of the Department of State*, 1784-1906 (National Archives Microfilm Publication M40, Roll 93).[9]

In 1887, after *Ker* was decided, Secretary of State Thomas Bayard maintained that transborder abductions violated the same extradition treaty in the context of the abduction of Francisco Arresures, who was seized in Texas by three deputy sheriffs and a Mexican police officer and brought to Mexico where he was killed in custody. Bayard complained that Arresures' return to Mexico was "obtained not in accordance with, but in fraud of existing treaties." Letter of Secretary of State T.F. Bayard to Thomas Manning (February 26, 1887), in *Diplomatic Instructions of*

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[9]The Government seeks to avoid the obvious implications of this letter by noting that it was written before *Ker v. Illinois*; however, the letter reflects clearly that the State Department early in the extradition relations between the United States and Mexico understood the extradition treaty to prohibit state-sponsored abductions. Moreover, by its terms and as interpreted, *Ker* does not apply when an extradition treaty is violated. *See*, § II, *infra*. Thus, the original understanding of the Treaty partners was untouched by *Ker*.

the Department of State, 1801-1906, Mexico (National Archives Microfilm Publication M77, Roll 117).[10]

Neither the United States nor Mexico has ever, until now, stated that it had the right to abduct nationals of the other country from that country's territory. Secretary of State Blaine's understanding that forcible abductions could not be used to circumvent the extradition treaty between the United States and Mexico has not been challenged in the years since, and there is no record that the United States asserted such a right in any of the negotiations leading up to the current Treaty.

Indeed, in the years just before the existing Treaty was adopted, the Congress placed stringent prohibitions on the kind of DEA action at issue in this case.[11] These

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[10]Contrary to the government's assertion, (Pet. Br. 28-29 n. 23), neither the 1906 *Martinez* incident, nor the decision in *Ex Parte Lopez*, 6 F.Supp. 342 (S.D. Tex. 1934), offers support for its interpretation of the Treaty. Neither case involved a treaty violation because no government agent appears to have been involved in the abductions. In both cases, therefore, the rule in *Ker* did apply. *See* § IIB, *infra*.

[11]In 1976, Congress specifically prohibited the DEA from taking part in arrests of foreign nationals in the sovereign territory of other governments. 22 U.S.C. § 2291(c), Foreign Assistance Act of 1961 as amended, § 481(c), *as enacted by* § 504(b) of the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 764 ("Mansfield Amendment"). This action was a specific response to concerns over DEA activities abroad. Sen. Comm. on For. Rels., Internal Security Assistance And Arms Expert Control Act, Report On S. 2662, S. Rep. No. 605, 94th Cong., 2d Sess. 55 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 1378. *See generally*, Lowenfeld, *U.S. Law Enforcement Abroad:*

restrictions could only have given Mexico confidence that the Treaty was negotiated with such limitations as a fundamental backdrop to the agreement.

C. The Government's New Interpretation of the Treaty is Inconsistent With International Law.

The government's characterization of the Treaty as optional is especially implausible in light of the clear and long-standing limitations on extraterritorial arrests in international law. In the absence of some manifestation of consent, it is a violation of international law for one government to exercise its police power in the territory of another state. These limitations are part of the fabric of our extradition relations with Mexico, and the Treaty must be interpreted accordingly. *See Rauscher, supra* (Webster-Ashburton Treaty interpreted to include customary law doctrine of specialty). This well-established customary principle forecloses the government's interpretation of the Treaty.[12]

The Constitution and International Law, Continued, 81 Am. J. Int'l Law 474, 478-80 (1990).

[12]Article 31(3)(c) of the Vienna Convention on the Law of Treaties *adopted*, May 22, 1969, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 8 INT'L LEG. MAT. 674 (1969), requires that, in interpreting a treaty, "there shall be taken into account ... any relevant rules of international law applicable in the relations between the parties." The Executive Branch has stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong. 1st Sess. (1971) at 1.

Every nation enjoys "necessarily exclusive and absolute" jurisdiction within its own territory. *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 136 (1812). "A states's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." *Restatement (Third) of Foreign Relations Law of the United States,* § 432 (2).

The international authorities in support of this principle are consistent, compelling, and ancient. In its seminal decision in *S.S. Lotus (Turkey v. France)*, the Permanent Court of International Justice summarized centuries of customary law by emphasizing that "the *first and foremost* restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its powers in any form in the territory of another State."[13]

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[13][1927] P.C.I.J. (ser. A.) No. 10 at 18. (Emphasis added). This doctrine of territorial integrity is protected by various international agreements such as the United Nations Charter, June 26, 1945, 59 Stat. 1037, T.S. No. 993, at Article 2 (4), and the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, at Article 20. The Government resists the cumulative and evidentiary effect of these provisions by denying what no party asserts. (Pet. Br. 5, 32-4). It is not necessary to find that these conventions offer independent grounds for invalidating extraterritorial abductions, only that they provide powerful evidence of the customary understanding with which the Treaty was negotiated. To the same effect, *see* the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988, entered into force for the United States November 11, 1990,

The practice of states reaffirms this basic principle.[14] In the *Eichmann* case, for example, when Israeli agents abducted the former Nazi from Argentina and brought him to Israel, the U.N. Security Council adopted, without

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T.I.A.S. No. ____, *reprinted in* 28 I.L.M. 493 (1989), art.2(2) and (3).

Expert commentary is also relevant in determining the content of the law of nations, *The Paquete Habana*, 175 U.S. 677, 700 (1900), and it uniformly recognizes the illegality of extraterritorial arrests without the consent of the affected state. *See, e.g.*, F.A. Mann , *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY (407 Dinstein, Ed.) (1989).

[14]*See generally* 1 Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE; ch. V., § 5.4 at 235-37 (2d rev. ed. 1987) (collecting cases); Preuss, *Settlement of the Jacob Kidnapping Case*, 30 Am. J. Int'l L. 123 (1936); *see also In re Vincenti* (1920), *in* 1 G. Hackworth, *Digest of International Law* 624 (1940) (U.S. released a U.S. citizen seized in the British West Indies, when Great Britain protested); *In re Jolis*, [1933-34] Ann. Dig. 191 (Tribunal Correctionnel d'Avesnes) (holding that the arrest of a Belgian by French police in Belgium was "a nullity," because the Belgian government lodged an official protest with the French government); *Casablanca Case (Fr. v. Germ.)*, Hague Ct. Rep. 110 (Scott ed. 1916) (holding, in regard to German deserters from the French Foreign Legion seized by the French in 1909, that it "was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate"). *But cf. Re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964) (repatriation not required if territorial state fails to protest abduction before trial.)

opposition, a resolution condemning the kidnapping and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law ...." U.N. Doc. S/4349 (1960). The acknowledged violation of international law was redressed only when Argentina and Israel resolved to consider the incident closed.[15]

In settings other than this case, the Executive Branch has faithfully recognized that extraterritorial abductions by government agents violate international law. The former Legal Advisor to the Department of State expressly testified that "[f]orcible abductions from a foreign state clearly violate this principle" of sovereignty and that "the United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity."[16] Nothing in Petitioner's brief qualifies or

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[15] *In re Eichmann*, 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 208-14 (1961).

[16] *FBI Authority to Seize Suspects Abroad, Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Jud. Comm.*, 101st Cong. 1st Sess. (1989) ("Oversight Hearings"), at 31 (Sofaer statement). The Office of Legal Counsel within the Department of Justice, addressing a hypothetical strikingly parallel to the case at bar, concluded that "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law." *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. Off. Legal Couns. 543 (1980). Even though the Department of Justice subsequently withdrew this letter and issued an unpublished replacement, there is no suggestion that the Department of Justice or any other executive department has repudiated this analysis of customary law. *See Oversight Hearings, supra*, at 20-21 (Barr statement), 34-37

alters this traditional view. There is no doubt that the United States would consider it a fundamental violation of its own territorial sovereignty if Mexico attempted to abduct a U.S. citizen from our territory[17] -- if, for example, the Mexican government responded by kidnapping the DEA agents who kidnapped Respondent. An obvious purpose of the Treaty is to discourage lawless self-help, no matter how justified the proclaimed objective of an abduction may be, or how impatient low-level DEA officials may be with this country's international obligations.[18]

(Sofaer statement).

[17]Indeed, when the Soviet Union attempted to kidnap a Soviet citizen within the territory of the United States, the State Department, drawing on the customary understanding among states, declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 DEP'T OF STATE BULL. 251 (1948).

[18]Recent treaties between the United States and Mexico reaffirm the customary prohibition against extraterritorial abduction. In 1987 and 1989, the parties agreed to cooperate closely in matters of legal assistance and drug law enforcement. The two nations were careful to state that their enhanced relationship should not be interpreted as a consent to abduction from one another's territory. Treaty of Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance, done in Mexico City, December 9, 1987, entered into force for the United States, May 3, 1991, T.I.A.S. No. ___, *reprinted in* 27 I.L.M. 443 (1988), art. 1(2); Agreement between the United States of America and the United Mexican States on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, done in Mexico City,

As shown above, treaties must be interpreted in light of relevant rules of public international law. In this case, that interpretive mandate means that the presumption must be that extraterritorial abductions are illegal unless they are specifically authorized, not that they are presumptively authorized unless explicitly prohibited. Given this customary law backdrop to the Treaty, there was no reason for Mexico to insist on a specific treaty provision explicitly prohibiting the United States from abducting Mexican nationals from Mexican territory.

The fact that the Executive Branch has now offered a different interpretation of the Treaty for the purposes of this litigation does not alter the international principles at stake. Although the government's construction of a treaty may be entitled to deference, *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176 (1982), this Court has frequently refused to adopt executive interpretations it considered irreconcilable with the text or purpose of the treaty itself. *See, e.g., Rauscher, supra; Ford v. United States, 273 U.S. 593 (1927); Cook v. United States, 288 U.S. 102 (1933); and Valentine, supra.*[19]

February 23, 1989, entered into force, July 30, 1990, T.I.A.S. No. ___, *reprinted in* 29 I.L.M. 58 (1990), art. I(3). No similar provision was required in the extradition treaty because its object was precisely to specify the ways in which criminal suspects could be rendered.

[19]This is equally true outside the context of extradition treaties. *See, e.g., Chan v. Korean Airlines*, 490 U.S. 122 (1989) (government's interpretation of the liability limitations laid out in the Warsaw Convention rejected); *The Amiable Isabella*, 19 U.S. 1 (1821) (government's unilateral interpretation of the Spanish Treaty of 1795 with respect to passports rejected); *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1 (1986)

Deference to the executive's interpretation may be especially appropriate when the *other* States parties to the treaty concur in the interpretation.[20] In such circumstances, the U.S. government's views may generally be said to comport with the international "meeting of the minds" that gave life to the treaty. But where, as here, the other party to a bilateral treaty specifically disputes the current administration's interpretation, deference is less justified. The basic meaning of a treaty should not be allowed to change from year to year, or administration to administration.

II. THE DISTRICT COURT LACKED AUTHORITY TO TRY RESPONDENT BECAUSE OF THE VIOLATION OF THE TREATY.

A. Under Well Established Precedents The Lower Courts Properly Declined To Exercise Jurisdiction Over Respondent Because of the Treaty Violation.

This Court's decisions in *United States v. Rauscher,* 119 U.S. 407, 425 (1886), *Ford v. United States,* 273 U.S. 593 (1927), and *Cook v. United States,* 288 U.S. 102 (1933), fully support the judgment below. These cases stand for

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(government's interpretation of aviation treaty rejected.)

[20]*See, e.g., O'Connor v. United States,* 479 U.S. 27 (1986) (Panama did not challenge U.S. government's interpretation of Panama Canal Treaty); *Sumitomo, supra* (Japan explicitly supported the U.S. government's interpretation of the Friendship, Commerce, and Navigation treaty between the United States and Japan).

the proposition that a treaty obligation may restrict the jurisdiction of the federal courts to try a criminal defendant.[21]

In *Rauscher*, the U.S. obtained the extradition of a sailor, William Rauscher, on a charge of murder of another crew member. Rauscher was then tried not for murder but for cruel and unusual punishment. Rauscher claimed that he was exempt from prosecution for any charge but murder under the extradition treaty. This Court agreed, holding that the internationally accepted doctrine of specialty must be assumed to be part of the 1842 Webster-Ashburton Treaty between the United States and Britain, and therefore that a defendant could be tried only for a crime for which he had been extradited. In other words, contrary to the government's sweeping assertion, the manner in which a defendant is brought before a court plainly affects the court's jurisdiction.

Rauscher does not sound this principle alone. Indeed, the Court reaffirmed it in *Cook* and *Ford*. In *Cook*, the defendant had been assessed a fine after his vessel had been seized by American officials. The vessel, however, had been caught outside the permissible zone defined by a treaty between the United States and Great Britain. The Court found that the treaty violation defeated the jurisdiction of United States courts over the vessel, stating that "[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of

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[21]As explained in *Rauscher*, 119 U.S. at 433, the treaty violation acts as a temporary limit on the trial court's personal jurisdiction over defendant, not barring trial "at some future time, when the defendant may have been properly brought within the jurisdiction of the court...." Respondent uses the term "jurisdiction" in this sense in this brief.

the Treaty." 288 U.S. at 121-22. Thus, where the government seizure is in violation of a treaty, there can be no jurisdiction over the seized person or thing because "the government itself lacked power to seize." *Id.* at 121; *see also Ford*, 273 U.S. at 606 (whether the seizure violated the treaty "affected the right of the court to hold the [defendants'] persons for trial").

The government attempts to limit the scope of *Rauscher*'s holding, arguing that it applies only where there is "both a clear violation of a treaty . . . and a clear intention in the treaty . . . to provide for termination of the prosecution as a remedy." (Pet. Br. at 17). This is simply not true. In *Rauscher*, no language in the treaty between the United States and Great-Britain indicated that the rule of specialty applied, or even peripherally alluded to the consequences of a violation on subsequent judicial proceedings. 119 U.S. at 429. Nevertheless, this Court reviewed the international law authorities of the day and found that the doctrine of specialty must be construed as part of the 1842 treaty. As the Court emphasized, "[t]he entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." *Id.*

The Court adopted the view that the absence of an explicit jurisdictional limitation in the Treaty could not leave the government free to try Rauscher for any crime it chose. The Court stated:

> The opposite view has been attempted to be maintained in this country, upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or

> fraud, or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself.

Id. at 430. Thus, the *Rauscher* Court rejected the precise argument made by the government in this appeal.

Likewise, the agreements in *Ford* and *Cook* did nothing more than reiterate the right of the United States to make seizures of illegal cargoes within the traditional three mile territorial sea and provided that Great Britain would not protest if seizures were also made within one hour's coasting distance.[22] Nowhere in the treaties were possible jurisdictional repercussions considered. Still, the Court made it clear that a violation of the treaty's implied provisions would prevent judicial proceedings and, of course, the infliction of criminal penalties. The Court

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[22]Similar to the government's claim in this case, the government argued that because the treaty did not contain explicit language obliging the U.S. not to seize ships beyond the one hour range, the treaty had not been violated. The Court rejected this myopic view and found that the language, structure and history of the treaty reflected the desire of both parties to deal with all searches and seizures of British vessels suspected of smuggling liquors beyond U.S. territorial limits. *Cook*, 288 U.S. at 111-12; *Ford*, 273 U.S. at 606. In other words, as in this case, the absence of a prohibition that the parties would have found it unnecessary to include did not mean that the prohibition could be ignored.

found such consequences to be implicit in the "purpose and effect of the Treaty." *Cook*, 288 U.S. at 121-22 (citing *Rauscher*); *Ford*, 273 U.S. at 606.

In short, the government repeatedly mischaracterizes the treaties involved in those three cases, stating that they contained explicit provisions conferring immunity from prosecution where persons or property were seized in violation of their terms. (Pet. Br. 19-20). In fact, like the treaty at issue in this case, they simply regulated the means by which a defendant can be brought before a court, be it via extradition or seizure. The jurisdictional effects were deemed to follow automatically.

The basic principle to be derived from *Rauscher*, *Cook*, and *Ford* is that the courts must decline to exercise jurisdiction over individuals prosecuted in violation of our treaty obligations. If the government's proposed requirements of explicit prohibitions and explicit remedies were accepted, each of these cases would be overruled.[23]

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[23]The Government offers two other reasons for distinguishing *Rauscher*. First, the Government argues that "*Rauscher* emphasized that its construction of extradition treaties 'did not intend to depart . . . from the recognized public law which had prevailed in the absence of treaties'." (Pet. Br. 19 n.14). Yet this merely supports Respondent's view that the Treaty must be read in the context of the clear international law prohibiting state-sponsored kidnapping.

Second, the government argues that the existence of Rev. Stat. §§ 5272 and 5275 was central to the decision in *Rauscher* (Pet. Br. 18 n. 13, 19 n. 14). Justice Miller's majority opinion referred to these statutes as additional support for a decision based on the Webster-Ashburton Treaty. *Rauscher*, 119 U.S. at 430. However, this Court later made it clear that *Rauscher* was based on the treaty. *See Johnson v. Browne*, 205 U.S. 309, 318

B. The Ker-Frisbie Doctrine Is Inapplicable.

By invoking the *Ker-Frisbie* doctrine, the government has relied exclusively on cases in which no treaty violation had occurred, or which involved strictly interstate relations within the United States. These precedents are simply inapplicable here. Where a defendant is brought before a court in violation of a treaty, jurisdiction will be defeated.

Moreover, the linchpin of the government's view of the *Ker-Frisbie* doctrine is that it reflects the judgment "that foreclosing prosecution is too high a price for society to pay for an unlawful arrest." (Pet. Br. 8, 17). But this rationale has no application in this case, because under Article 9 (2) the case against Respondent will be submitted for prosecution in Mexico, if the United States requests extradition and it is denied. This is precisely the right the United States obtained in negotiating the Treaty.

1. Ker v. Illinois Does Not Govern This Case.

The government argues that *Ker v. Illinois* established a sweeping principle -- namely that, barring exceptional circumstances, a court will not inquire into the means by which an individual has been brought before it. The government attempts to portray *Rauscher* as an "exception" to the more general rule articulated in *Ker*. There is no support in precedent or logic for this characterization.

(1907) ("The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.")

Rauscher is no more an exception to *Ker* than *Ker* is to *Rauscher*; rather, each one applies in a distinctive setting: *Rauscher* where there has been a violation of a treaty's express or implied provisions, and *Ker* where there has not.

In *Ker*, a U.S. citizen who had fled to Peru to escape embezzlement charges was forcibly returned to the United States by a private security guard. Though the guard carried official extradition papers within the framework of the 1870 extradition treaty between the United States and Peru, the seizure was made outside of formal extradition procedures. That the abduction did not violate the extradition treaty is evidenced first by the absence of any U.S. involvement in the kidnapping, and second by the absence of any protest by Peru. *See Ker*, 119 U.S. at 438, 441-43 (Ker's abduction "was a clear case of kidnapping within the domain of Peru, without any pretense of authority under the Treaty or from the government of the United States"); *Ker v. Illinois*, 110 Ill. 627, 640 (1884) (noting absence of protest).[24] The former negates any notion that the U.S. government might have breached its obligations. The latter means that Peru's acquiescence must be inferred,[25] transforming Ker's abduction into a consensual informal rendition. At most, then, the private security guard's actions violated Peru's laws.

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[24]At the time of the kidnapping, Peru was partially under Chilean occupation. Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678, 685 (1953). The Chilean government also filed no protest.

[25]Ker was a U.S. citizen who fled Illinois to avoid pending criminal charges. In such circumstances, acquiesence or consent would be highly likely and no bar to renditions of nationals would apply.

Accordingly, the right invoked by Ker was not Peru's right as a sovereign, but rather his own alleged "right of asylum" under the treaty. It is this purported right that the Court easily rejected. Indeed, as the Court recognized, Peru had the sovereign prerogative to deport Ker if it so chose. 119 U.S. at 424. Similarly, Peru had the right to consent, explicitly or silently, to the kidnapping of Ker from its territory -- a right Peru exercised by silence in that case.

In *Ford*, the Court expressly found *Ker* inapplicable to claimed violations of a treaty. The Court stated:

> The Solicitor General [asserts], on the authority of *Ker v. Illinois* . . ., that an illegal seizure would not have ousted the jurisdiction of the court to try the defendants. But the *Ker* case does not apply here. It related to a trial in a state court, and this court found that the illegal seizure of the defendant therein violated neither the federal Constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their [sic] trial after alleged seizure was not a matter of federal cognizance. Here a treaty of the United States is directly involved, and the question is quite different.

273 U.S. at 605-06.

Two basic elements are therefore required to find that a treaty has been violated and that the violation divests a court of its jurisdiction: (1) abduction by individuals clothed with the authority of the prosecuting state; and (2) protest by the state where the kidnapping occurred. Absent one of these elements, a court will find that there has been no treaty violation, either because the country trying the suspect has committed no illegitimate sovereign act, or because the non-protesting nation will be deemed to have acquiesced in the rendition.

Consistent with these requirements, every lower court case adhering to *Ker* in the context of an international abduction has exhibited one or more of the following factors:[26] (1) The absence of an official protest by the government of the country from whom the suspect was abducted, (2) the direct involvement or consent of the foreign government in the rendition of the suspect to the United States; or (3) the absence of direct involvement of the United States government in the abduction.[27] Like *Ker*, therefore, these cases are silent as to the governing principle in this case and cannot support the government's assumption that *Ker* applies in such circumstances. While the broad language in some of these cases does evidence a self-imposed reluctance to inquire into how a defendant

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[26]The lower court cases are collected in *Verdugo-Urquidez*, 939 F.2d at 1349 n. 9. & 1353 n. 12.

[27]Some cases lack more than one critical element. Thus, in *State v. Brewster*, 7 Vt. 118 (1835), a case the government describes as one of *Ker*'s forerunners, (Pet. Br. 14), no treaty was in place, and there was no suggestion that Canada objected to the forcible removal. *Id.*, at 120-21.

The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102, 104 (1815), relied upon by the government (Pet. Br. 14 n.8), did not erect an absolute bar to the adjudication of the lawfulness of the seizure of vessels in violation of international law. This Court recognized in *The Paquete Habana, supra*, that the seizure of a neutral fishing vessel in violation of customary international law was justiciable at the behest of the injured owners. Further, U.S. courts would order the return of the seized vessel and cargo in prize cases where the neutral state, in whose territory the seizure had occurred, officially intervened to assert the customary law violation. *See The Anne*, 16 U.S. (3 Wheat.) 435 (1818); *The Adela*, 73 U.S. (6 Wall.) 266 (1868).

has been brought before the court, violations of international treaties were not presented in any of these cases.[28]

The government asserts that "[i]t is telling that . . . no decision has previously held that an extradition treaty prohibits arrests made outside the treaty terms." (Pet. Br. 27). But it is equally telling that no decision has held that the government may do what these DEA agents did here. And the most telling fact of all is that the United States government has never before engaged in such egregious conduct and asked the courts to ratify it.

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[28]The international cases cited by Petitioner appear to be distinguisable for the same reason. In neither *Ex Parte Scott*, 9 B. & C. 446 (1829), nor *R. v. Lopez and Sattler*, 1 Dearsly & Bell's Crown Cases 525 (1858), is there any mention of a treaty or protest. Indeed, in *Lopez, id.* at 547, foreign authorities assisted in the defendant's arrest and the crime at issue had been committed subsequent to his abduction on an English ship that was "part of the territory of England." *Id*; *see also*, O'Higgins, *Unlawful Seizure and Illegal Extradition*, [1960] *Brit. Y. B. Int'l L.* 279. Cases after *Ker* are to the same effect. In *In re Eichmann, supra*, Argentina had withdrawn its protest *prior* to the time of trial. *See also, Afouneh v. Attorney-General*, 4 Ann. Dig. 328 (Palestine S.Ct. 1942) (acquiescence in abduction); *Ex Parte Elliott*, 1 All E.R. 373 (K.B. 1949) (acquiescence); *Re Karoly*, 4 Ann. Dig. 345 (same); *The Savarkar Case* (Feb. 24, 1911), *reprinted in*, Hague Court Reports 275 (Scott Ed. 1916) (same). Although language in *In Re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964), might provide some support for the government's view, the facts in that case do not indicate that a timely protest was lodged or that the French government participated in the abduction.

2. Cases Involving Domestic Abductions Are Inapplicable To This Case.

The government also heavily relies on the *Frisbie* line of cases for its broad proposition that the federal courts may not consider the treaty violation at issue here. (Pet. Br. 15-17). But *Frisbie*, its progenitors, and its progeny, all involve instances of interstate abductions in which neither a treaty, nor international law generally, was even peripherally involved. Plainly, these decisions have no bearing on cases of international kidnapping in which extradition treaties between sovereign nations play a central part and serve to establish limitations on the power of one nation to try a criminal suspect who is a national and resident of the other.

Principles of domestic extradition by contrast are governed by Article IV of the Constitution and the Extradition Act, 18 U.S.C. § 3182, neither of which was "used to express the law of extradition as usually prevailing among independent nations." *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132 (1917). Far from embodying principles of national sovereignty, their design was "in effect, to eliminate, for this purpose, the boundaries of the states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land." *Id.* at 133; *see also Nevada v. Hall*, 440 U.S. 410, 425 (1979) (extradition clause "demonstrate[s] that ours is not a union of 50 wholly independent sovereigns.")

States of the Union lack the discretion not to surrender one of their nationals. Whatever else might be argued, a suspected criminal who has been forcibly abducted into a state cannot complain that the Extradition Clause divested either the state or the court of its authority. Therefore, the line of cases dealing with domestic kidnappings provides no guidance to determine the effect of a violation

of an extradition treaty binding the United States and a sovereign nation.

Frisbie demonstrates the point. *Frisbie* involved the kidnapping by Michigan police of a murder suspect living in Illinois. The Supreme Court rejected a due process claim based on this abduction and also a claim based on the Federal Kidnapping Act. The *Frisbie* case did not deal with claimed treaty violations and thus does not undermine the application of *Rauscher, Ford* or *Cook*. *See United States v. Postal,* 589 F.2d 862, 875 n.19 (5th Cir), *cert. den.*, 444 U.S. 832 (1979).

This Court has long recognized what the government ignores here: the difference between international and interstate relations. In *Lascelles v. Georgia,* 148 U.S. 537 (1893), this Court declined to extend *Rauscher* to transactions between sister states. To hold otherwise would be to assume "that the states of the Union are independent governments having the full prerogatives and powers of nations..." *Id.* at 541-42. The Court went on:

> *The case of [Rauscher] has no application to the question under consideration, because it is proceeded upon the jurisdiction of a right given impliedly by the terms of a treaty.* . . . To apply the rule of international or foreign extradition, as announced in [*Rauscher*] to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty, contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion. . . In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supremacy clause of the land.

Id. at 545-46 (emphasis added).[29]

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[29]The government has also pointed to cases purportedly holding that precluding the defendant's prosecution is never the appropriate remedy. (Pet. Br. 16-17). Again, however, its misapplication of and unjustified extrapolation from case law is manifest. In those cases, the Court found that alternative means of redress -- such as evidentiary exclusion or the imposition of civil or criminal liability -- would provide an adequate remedy for the offense, typically an illegal arrest in violation of the Fourth Amendment. In contrast, violations of a treaty that recognizes limitations on each signatory nation's territorial reach and on its right to try a defendant residing in the other country directly affect the jurisdiction of the court. This can only be remedied by repatriation. Moreover, to preclude the defendant's prosecution in typical cases of unlawful arrest or interstate abduction would be a pointless exercise. *See, e.g., New York v. Harris*, 495 U.S. ___, 109 L.Ed.2d 13, 20 (1990) (noting that the defendant could be "immediately rearrested if momentarily released,"); *Verdugo-Urquidez*, 939 F.2d at 1347 (in cases of interstate abduction, because each state must deliver fugitives to the requesting state, *see* 18 U.S.C. § 3182, to send a suspect back would constitute "an exercise in futility"); *see also Lascelles*, 148 U.S. at 546 (noting that it would be "baseless and idle" for a state to return the suspect back to one state only to see him reappear); *Ker, supra*, (because the treaty at issue did not give the requested party the option of prosecuting the subject itself, the United States would have been entitled to obtain his surrender, and "two more trips across the sea would be the outcome to Ker of this extraordinary venture." (Brief for Defendant in Error, at 17-19.))

C. Respondent Has Standing To Assert The Violation Of The Treaty To Challenge The District Court's Jurisdiction Over Him.

In arguing that Respondent lacks standing to raise the Treaty violation, the government misinterprets the law and ignores over a century of precedent. The threshold inquiry is whether the implied Treaty provision prohibiting unconsented government-sponsored abductions is self-executing, i.e., whether it creates judicially enforceable obligations. The government carefully avoids this question.

Yet the answer can be found in numerous cases in which this Court has assumed that extradition treaties, including their implicit terms, were self-executing. There is no valid reason for making a distinction between the implicit obligation not to try one who has been forcibly abducted by government agents in circumvention of a treaty and the implicit obligation not to try a person for unspecified offenses, held to be judicially enforceable in *Rauscher*. Both confer rights upon individuals. Both must be found to be self-executing.

Once this self-execution inquiry is properly addressed, it is apparent that Respondent has standing to raise the Treaty as a bar to these proceedings. For a provision to be self-executing, it must impose an obligation on the government that courts may apply immediately and directly at the behest of specific persons. If this standard has been met, an individual tried in violation of this particular provision by definition has standing to raise the issue.

1. The Treaty's Ban On Unilateral Abduction Of Mexican Nationals is Self-Executing.

In nearly two centuries of case law, this Court has repeatedly held that self-executing treaty provisions are

directly enforceable by the judiciary. In order to be deemed self-executing, a treaty must create obligations that are not contingent upon further legislative action, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); *Foster v. Neilson*, 27 U.S. (2 Pet. 253) 253 (1829); and that are intended to benefit the individual asserting a legal interest under them. *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

In so holding, this Court effectuated the clear understanding of the Framers as embodied in the Supremacy Clause. The Framers were well-aware that treaties often are drafted to confer benefits upon individuals as well as to create reciprocal obligations for the states parties. Securing effective and prompt domestic enforcement of treaty rights was a primary aim of the Supremacy Clause and Article III.[30] Rather than rely upon political action to secure state compliance with the treaties of the newly constituted nation, the Framers made treaties the supreme law of the land, binding on the federal

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[30]The Framers rejected a proposal to permit Congress to invalidate state legislation conflicting with the treaty obligations of the U.S., in favor of the Supremacy Clause, which directs the state judges to strike down such legislation in cases where the litigants plead and prove a conflict with a treaty. V Elliot, *Debates on the Adoption of the Federal Constitution*, 127-128, 192, 322 (1974 reprint). The delay and uncertainty of the political solution figured largely in this choice. *Id.* at 321 (Mr. Martin), 468 (Mr. Mason and Mr. Morris).

and state judiciaries alike.[31]

Applying this prior jurisprudence, the Court has long recognized extradition treaties as prototypical examples of self-executing treaties, regardless of whether the treaty itself provides measures for domestic enforcement, and regardless of whether the specific treaty term is implicit or explicit. *See Rauscher, supra; Valentine, supra; Johnson, supra*. In particular, the fact that a treaty covers relations between sovereigns has never been seen as a bar to its invocation by individuals and enforcement by courts. A contrary view would effectively read Article VI out of the

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[31] From an early date this Court has given effect to this choice. In *Ware, supra*, an individual British creditor successfully relied upon the 1783 Treaty of Peace to prevail against a debtor attempting to bar collection on the basis of a state statute that conflicted with the treaty terms. This was so despite the fact that in Great Britain treaties are not enforceable in the absence of implementing legislation adopted by Parliament. The members of the Court emphasized the effect of the Supremacy Clause in making article 4 of the Treaty of Peace directly enforceable. This principle was reiterated in *Foster*, where Chief Justice Marshall remarked that *some* treaties would not be self-executing, if the text indicated that the benefits were contingent upon further legislative action. Noting that in other countries, as under the Articles of Confederation, treaties were enforceable only on the basis of implementing legislation, Chief Justice Marshall emphasized that by virtue of the Supremacy Clause:

> In the United States *a different principle is established*. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

27 U.S. at 314 (emphasis added).

Constitution for a treaty "is essentially a contract between two sovereign nations." *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 675 (1979).[32]

This has been recognized by the Executive Branch as well. For example, in 1895, Secretary of State Gresham informed the German Ambassador that it was *not* the law in the United States that extradition treaties created "rights

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[32]Extradition treaties resemble treaties of friendship, commerce and navigation, and treaties concerning inheritance rights of aliens, in that they have a dual purpose of conferring rights upon individuals and creating reciprocal obligations and rights on the part of the contracting states. *Head Money Cases*, 112 U.S. at 598; *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *Air France v. Saks, supra*; *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940); *Clark v. Allen*, 331 U.S. 503 (1947). This Court has never had difficulty in recognizing such treaties as being self-executing even though they are silent with respect to domestic remedies. The thrust of the government's argument (Pet. Br. 34-37) is that *no* treaties are self-executing. In fact, treaties are silent on domestic remedies because this is a matter governed by domestic law, *e.g.*, the Supremacy Clause.

This Court's approach in *Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865 (1991), is instructive. The issue there was whether individuals have judicially enforceable "rights" derived from the Commerce Clause. The Court rejected the argument that the Commerce Clause "merely allocates power between the Federal and State Governments, and does not confer 'rights.'" 111 S.Ct. at 870. The *Dennis* Court referred to the Commerce Clause as a "self-executing limitation on the power of the States...." 111 S. Ct. at 870 (citing *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)). It further noted in *Dennis* that the fact that the right at issue was implied under the Commerce Clause (which speaks literally only to the power of Congress) rather than being express did not diminish its status as a right or affect its enforceability. 111 S.Ct. at 871 n. 7.

only between the Governments concerned." Rather "[i]t has been the settled law of [the United States] that the exemption from such prosecution is so far a personal right that the extradited person may demand and obtain its judicial enforcement." IV Moore, *International Law Digest* 321 (1906).

The government's position cannot be reconciled with this extensive case law and historical background. Because there can be no serious dispute that extradition treaties routinely have been viewed as self-executing, the sole question is whether the implied right not to be tried following an unconsented to, government-sponsored abduction can somehow be distinguished from other treaty provisions. It cannot. In bargaining for the terms of extradition treaties, nations seek to promote cooperation in law enforcement while preserving their sovereignty and bestowing benefits to certain classes of persons.[33] The prohibition against unconsented to abductions, expressed both in Article 9 and the whole structure of the Treaty, evidences a clear intent to confer benefits upon individuals. It is, therefore, self-executing.

The government's attempt to dismiss *Rauscher*'s evident relevance in a footnote strains credulity. (Pet. Br. 35 n.30). In particular, there is no basis for the government's suggestion that whether a treaty term is self-executing might depend on the scope of the required remedy. (Pet.

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[33]For example, I.A. Shearer notes that in perhaps the earliest recorded treaty to include extradition measures, a treaty of peace between Rameses II of Egypt and the Hittite prince Hattusili III, c. 1280 B.C., the parties agreed that persons surrendered would be spared severe punishments such as mutilation and destruction of home and family. Shearer, EXTRADITION IN INTERNATIONAL LAW, 5-6 (1971).

STATEMENT OF INTEREST

The Minnesota Lawyers International Human Rights Committee ("Committee") was founded in 1983, and is a nonprofit organization of lawyers committed to the promotion and protection of human rights worldwide, including the right to be free from abduction, disappearance, and arbitrary arrest. The Committee is a community-based human rights organization of lawyers in Minnesota and other parts of the United States that works impartially to hold all governments to the rule of law. The Committee is governed by a Board of Directors, chaired by Louis H. Smith, Esq. The Executive Director of the Committee is Barbara A. Frey, Esq. The Committee regularly sends fact-finding delegations to foreign countries and assists various courts as *amicus curiae* in cases involving violations of international human rights law. The Committee has been involved in developing international standards for medico-legal investigation into extra-legal and summary executions wherever they may occur and the filing of habeas corpus petitions to seek relief for the detained and disappeared in other countries. The Committee has a specific interest in the present case as part of its promotion of the observance of international human rights standards and its ongoing opposition to government-sponsored kidnapping. The Committee has also sent several delegations to study human rights in Mexico and has promoted a U.S.-Mexico relationship with a particular focus on human rights.

SUMMARY OF ARGUMENT

The problem of government-sponsored forced disappearances has plagued countries of the Western Hemisphere for thirty years. In Argentina, Chile, El Salvador, Guatemala, Peru and many other countries, the breakdown of respect for the rule of law has resulted in kidnapping, torture, death, and other suffering for thousands of innocent persons. Because the government in these places has not respected the rule of law -- sometimes in the name of "fighting subversion" or "protecting" democracy -- rights and protections of all citizens have been

weakened. The United States, however, has advocated a system of justice that maintains the utmost respect for the rule of law over short-run goals and needs. The fight against the importation of illegal drugs and the lawlessness of those people who profit from such activities is of vital importance to the United States and other countries in the hemisphere. In that fight, however, the United States must not risk the degradation of the liberties it seeks to protect by circumventing the rule of law.

I. The Manner in which Respondent Humberto Alvarez-Machain was Kidnapped and Abducted to the United States Violates the 1980 Extradition Treaty between the United States and Mexico.

The 1980 Extradition Treaty between the United States and Mexico (the "1980 Extradition Treaty")[1] is designed to protect the sovereignty and territorial integrity of both countries. The extradition treaty is also intended to protect the rights of citizens of both Mexico and the United States when one country seeks to obtain custody of citizens from their homeland. The United States Congress and United States courts have recognized that an abduction which circumvents the protection of an extradition treaty, if sanctioned officially, is not just a kidnapping but also a direct affront to the sovereign jurisdiction of the other nation. The abduction of Alvarez-Machain violates the sovereignty and territorial integrity protections of the 1980 Extradition Treaty.

II. The Violation of the 1980 Extradition Treaty Deprives the District Court of Jurisdiction over the Defendant.

The U.S. Court of Appeals for the Ninth Circuit correctly held that as a result of the United States Government's abduction of Alvarez-Machain in violation of the 1980 Extradition Treaty

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[1] *See* Extradition Treaty Between the United States and United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5058, T.I.A.S. No. 9656, *entered into force* Jan. 25, 1980.

and the subsequent protests of the Mexican Government, the District Court could not exercise personal jurisdiction over the defendant. United States courts have established that courts cannot exercise criminal jurisdiction over persons detained as a result of treaty violations.

Alvarez-Machain has standing to assert violation of the 1980 Treaty as a bar to the District Court's jurisdiction as a result of the official protest by the Mexican Government. Furthermore, federal district courts, in administering and interpretating extradition treaties as the law of the land in the United States, have wide-ranging powers to question those elements necessary for the exercise of the court's jurisdiction, including raising the issue of the validity of the court's personal jurisdiction over a defendant. In addition, it cannot be said that the District Court impermissibly interfered with the Executive's conduct of foreign policy by examining the court's personal jurisdiction over Alvarez-Machain through the application of the terms and provisions of the 1980 Treaty. Simply put, this Court is competent to read and interpret extradition treaties and the exercise of that constitutional power does not involve any issue of separation of powers or potential to "embarrass" coordinate branches of government.

III. Customary International Law Mandates the Return of Defendant to Mexico as the Remedy to the Violation of the 1980 Extradition Treaty.

United States courts have long held that customary international law forms an integral part of United States domestic law. Whenever possible, United States courts interpret treaties and statutes to be consistent with the dictates of customary international law.

International law dictates that the remedy for state-sponsored abduction of another country's citizen in violation of an extradition treaty is the return of the citizen to his/her home country. This internationally recognized remedy will not harm the United States, but rather, will protect the rights of its own citizens.

ARGUMENT

I. The Manner in which Respondent Humberto Alvarez - Machain was Kidnapped and Abducted to the United States Violates the 1980 Treaty of Extradition between the United States and Mexico.

The kidnapping and abduction of Dr. Humberto Alvarez-Machain by agents paid by and under the direction of the Drug Enforcement Administration ("DEA") violate the provisions for extradition set forth in the 1980 Extradition Treaty. The 1980 Extradition Treaty is designed to protect the sovereignty and territorial integrity of both the United States and Mexico. The 1980 Extradition Treaty provides that access to each party's national territory may only be gained pursuant to the treaty. *See supra* note 1, Article 20(1). Treaty Article 4(1) defines the territorial jurisdiction of the contracting parties:

> For the purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

Id. at Art. 4(1).

Because the 1980 Extradition Treaty is inherently designed to protect the party's sovereignty, that sovereignty can be breached only in the manner expressly provided for in the Treaty. The 1980 Extradition Treaty sets forth the conditions under which either the United States or Mexico may request the extradition of a citizen from the domestic territory either sovereign state. Article 9 provides that within the territorial jurisdiction of a party, that party is not bound to deliver its own nationals. *See id.*, Article 9(1). The 1980 Extradition Treaty further creates a full set of procedures to be followed by a party requesting extradition of a citizen from the other country's territory. *See id.*, Article 10. In

addition, Article 11 provides for the provisional arrest and detention during a period of 10 days of a person in the case of urgency.

Furthermore, Article 14 of the 1980 Extradition Treaty provides that the decision of the territorial sovereign to extradite its national is final and that the surrender of the person sought is controlled by the laws of the territorial sovereign. *See id.* Article 14 ("(1) The Requested Party shall promptly communicate to the requesting Party its decision on the request for extradition . . . (3) If the extradition is granted, the surrender of the person sought shall take place within such time as may be prescribed by the laws of the requested party. . . ."). The completeness of the 1980 Extradition Treaty's procedural provisions indicates that the United States and Mexico fully intended the treaty to provide the exclusive means whereby a party could act within the territorial jurisdiction of the other party to obtain custody of a national of that party.[2]

In the present case, the kidnapping and abduction of Alvarez-Machain from the sovereign territory of Mexico were carried out with the knowledge and active participation of the

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[2] As recently as 1985, Abraham Sofaer, the Legal Adviser of the State Department, was of the opinion that unilateral abductions by United States officials would violate the territorial sovereignty of other nations, stating:

> In general, I would say that seizures by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of a foreign state and could violate local kidnapping laws. . . . Such acts might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations.

Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986). *See also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law Continued*, 84 Am. J. Int'l. L. 444, 449-50 (1990); John Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1452-53 (1988) (discussing the testimony of Sofaer).

United States Government. The persons who kidnapped Alvarez-Machain were paid and instructed by DEA agents. Supervising directors of the DEA and possibly the United States Attorney General's Office had knowledge of and approved the kidnapping before it took place. This case does not involve a situation in which the United States received custody of a person as a result of "informal rendition" -- actions taken by others outside of the protections of an extradition treaty. Here, there was unilateral United States Government action to violate the 1980 Extradition Treaty with Mexico by kidnapping and removing a Mexican citizen to the United States without the consent of the Mexican Government. This type of covert abduction simply cannot be characterized as "informal rendition" but rather constitutes a violation of the 1980 Extradition Treaty.

Both Congress and the courts of the United States have recognized that extradition treaties provide protection of the territorial sovereignty of the contracting states. Congress has enacted legislation providing that the United States should employ the extradition treaty with Mexico to obtain jurisdiction over Mexican nationals from Mexican sovereign territory subject to judicial proceedings in federal district court. See 18 U.S.C. § 3184 (1988).[3]

Congress further provided for the protection of individuals extradited pursuant to Section 3184. Congress, in 18 U.S.C. Section 3192, established that:

> Whenever any person is delivered by a foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have the power to take all necessary measures for the transportation and safekeeping of such

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[3] For an example of a U.S. court implementing the terms of an extradition treaty using 18 U.S.C. § 3184, see *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984), *cited in INS v. Doherty*, ___ U.S. ___, 112 S. Ct. 719, 116 L.Ed.2d 823, 60 USLW 4085, 4087 (1992).

> accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States or of the militia thereof, as may be necessary for the safekeeping and protection of the accused.

18 U.S.C. § 3192 (1988).

In 1976, Congress expressly prohibited officers or employees of the United States from taking part in arrests of foreign nationals in the sovereign territory of foreign countries with respect to DEA activities. Following the decisions in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975), and *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), Congress adopted the Mansfield Amendment to the Foreign Assistance Act of 1961 which provided:

> [§ 481](c)(1) Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts.

22 U.S.C. § 2291(c) (Supp. 1990).

In its report on the Mansfield Amendment, the Senate Foreign Relations Committee wrote:

> In adopting this restriction, the Committee seeks to reconcile two important U.S. interests; motivating foreign governments to cooperate to the fullest degree in stopping drugs from reaching the U.S. and avoiding excessive U.S. intervention in the internal affairs of other nations. The range of actions carried out by U.S. narcotics agents overseas covers a wide spectrum -- from the innocuous

> (exchanging information and intelligence) to the clearly objectionable (actions involving the use of force and actions involving arrest of foreign nationals).
>
> It is the Committee's intent that "police action," as used in this provision, is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and actions involving the arrest of foreign nationals -- whether unilaterally (acting on their own) or as members of teams involving agents or officials of other foreign governments. And more broadly, it is the Committee's intent that the Drug Enforcement Administration and Chiefs of U.S. diplomatic missions overseas exercise special care to insure that U.S. narcotics agents overseas not engage in any types of actions in which there is a reasonable risk of embroiling the U.S. in the internal affairs of other countries by tending to lead them into situations involving the use of force or the arrest of foreign nationals.

Senate Comm. on Foreign Relations, Internal Security Assistance and Arms Expert Control Act, Report on S. 2662, S. Rep. No. 605, 94th Cong., 2d Sess. 55 (1976).

Congress revised the Mansfield Amendment in 1986, 22 U.S.C. § 2291(c)(1)-(6) (Supp. 1990), and again in 1989, 22 U.S.C. § 2291(c)(2), (Supp. 1990) but the intent of the original text remains intact. The 1986 revisions provided authorization for the Secretary of State to waive the prohibition on participation of U.S. officers in an arrest.[4] A 1989 revision provided that U.S. officers may be *present* for arrests of foreign nationals in the sovereign territory of a foreign country "with the approval of the United States chief of mission." 22 U.S.C. § 2291(c)(2) (Supp. 1990).

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[4] 22 U.S.C. § 2291(c)(2) (1989) (as it read from 1986 to 1989). *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 Am. J. Int'l. L. 444, 478-80 (1990).

The clear intention of the Mansfield Amendment was to restrict the activity of United States officers in the arrest and transport of foreign citizens from the territory of other nations. There is no indication that Congress would approve of United States officers, namely DEA agents, hiring local agents to act as surrogates to carry out the arrest and transport of suspected criminals from foreign territories. Rather, Congress provided that jurisdiction over criminals be obtained through the procedures established in formal extradition treaties.

While Congress has not explicitly provided that abductions of foreign nationals from foreign territories by agents of the United States violate the sovereignty of the host country and contravene the provisions of extradition treaties, Congress has made clear that it is troubled by unilateral actions of U.S. narcotics agents which infringe on the sovereignty of other nations and that United States courts should, instead, obtain jurisdiction over foreign nationals from foreign territories in accordance with the provisions of extradition treaties.

The petitioner contends that the United States' direct involvement in the kidnapping of a Mexican citizen from the sovereign territory of Mexico does not violate the 1980 Extradition Treaty because such actions are not expressly covered by the treaty. The petitioner's assertion is not supported by provisions of the treaty, United States law, or decisions of United States courts interpreting extradition treaties.

The United States Court of Appeals for the Ninth Circuit correctly rejected the petitioner's argument. United States courts, interpreting the protections offered by treaties, have concluded that jurisdiction of United States courts over foreign nationals for crimes committed outside of the United States is not simply a reflection of power over the person, rather it is a right governed by extradition treaties within the bounds of respect for the sovereign territories of the treaty participants. This Court, in *United States v. Rauscher*, 119 U.S. 407 (1886), recognized that extradition treaties are enacted to protect the interests of nations in the exercise of sovereign jurisdiction over their inhabitants even when faced with requests from other nations:

> Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation of one country to deliver up such fugitives to another: and, though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Id. at 411-12.

In *United States ex rel. Donnelly v. Mulligan*, 74 F.2d 220 (2d. Cir. 1934), the Second Circuit Court of Appeals similarly held that:

> Thus it is now clear that apart from a treaty a state has no duty to deliver up a person who has sought asylum within its boundaries. If the state wishes, it can afford him a refuge and protection from the state which he has fled. Of course, a state is under no duty to afford asylum to a fugitive; it may expel him from its territories if it chooses, and without complaint from the individual who is expelled. But it may grant to him an asylum, and, if such is done by it, no breach of international law is involved.

Id. at 222. United States courts have also recognized that an abduction which circumvents the provisions of an extradition treaty, if sanctioned officially, is not just a kidnapping but also a direct affront to the sovereign jurisdiction of the nation from which the individual is taken. In *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931), a case involving the extradition to Canada of an informant who, with an American narcotics agent, had abducted a person from Canada, the court noted:

> A person may be carried out of the country to answer for crime, however, only by the authority of the highest executive officials and in accordance with treaty

> provisions governing extradition. An unlawful arrest is merely an offense against the peace and dignity of the state; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former.

Id. at 19.

The petitioner relies on a number of recent opinions which acknowledge that regardless of the means a foreign country chooses to deliver an individual to the United States, the means of delivery does not bar U.S. courts from exercising personal jurisdiction over the delivered individual.[5] The petitioner attempts to conclude from these cases that the United States is therefore free to act outside of the provisions established by extradition treaties to gain custody of foreign nationals residing in the territory of a country with which a bilateral extradition treaty exists. This inverse implication is not supported by United States case law.[6]

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[5] *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (holding that where Thai immigration officials delivered a United States citizen to DEA agents, and Thailand did not protest the person's removal from Thailand, there was no violation of extradition treaty); *United States v. Cordero*, 668 F.2d 32, 38 (1st Cir. 1981) (holding that where Panama and Venezuela deported persons that were not citizens of those countries and did not protest the transfer of those persons to the United States, there was no violation of the extradition treaties between the United States and those countries); *United States v. Toro*, 840 F.2d 1221, 1235 (5th Cir. 1988) (holding that where Panamanian authorities arrested a person who was not a Panamanian citizen and delivered that person to DEA agents on a United States Air Force Base, and Panama did not protest the arrest and transfer, there was no violation of the extradition treaty).

[6] United States courts have long held that government actions which circumvent the manifest scope and purpose of extradition treaties providing for the exclusive manner of rendering fugitives among the signatory nations violate the treaty itself. *United States v. Rauscher*, 119 U.S. 407, 422, 430 (1886) (holding that a person could be tried only for an offense for which he had been extradited and on no other charge and failure of United States to abide by this principle violated the treaty, although the treaty contained no express provision prohibiting such an action); *Johnson v. Browne*, 205 U.S. 309 (1907) (holding

In *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987), the Eleventh Circuit Court of Appeals acknowledged that removal of a foreign national from a country which is party to an extradition treaty with the United States, accomplished by United States agents, would constitute a treaty violation. The *Jaffe* decision resulted from the kidnapping and removal by professional bounty hunters of a Canadian citizen to the United States for trial in Florida. *Id.* at 305-06. Canada brought a habeas corpus petition on behalf of the defendant claiming that the abduction was arranged by U.S. officials in violation of the Canada-United States extradition treaty.[7]

The Court of Appeals found that extradition treaties incorporate protection of the sovereign territory of the parties, noting that: "Under international law, as recognized in the United States, any nation has the right not to surrender fugitives, but instead to grant asylum. The function of extradition treaties is to create exceptions to this right of other nations." *Id.* at 306. The Jaffe court found that because the kidnapping was not carried out

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that it was an extradition treaty violation for the United States to imprison a person on a sentence imposed before he became a fugitive rather than trying him on the charge for which he was extradited, although the treaty did not expressly prohibit such an action). *Ford v. United States*, 273 U.S. 593 (1927) (U.S. Coast Guard seizure of vessel in area not contemplated by express language of treaty violated treaty); *Cook v. United States*, 288 U.S. 102, 121-22 (1933) (holding that "the Government itself lacked power to seize, since by the Treaty, it had imposed a territorial limitation upon its own authority" even though the United States actions did not violate express language in the treaty). *See also* John Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1449-55 (1988) (arguing that under U.S. case law official kidnapping is not an acceptable alternative to extradition).

[7] Jaffe was incarcerated for a prior conviction but later allowed to post bond on a subsequent charge. After posting bond, Jaffe returned to Canada and failed to appear for trial on the later charge. The district court declined jurisdiction of the habeas corpus appeal because Jaffe had abused the writ and was a fugitive from justice, and indicated that if it did accept jurisdiction, it would dismiss the appeal on the merits. The Court of Appeals accepted an appeal to determine the issue of whether there had been a violation of the extradition treaty which would render the subsequent charges invalid. 825 F.2d at 306.

with involvement of the United States Government, the defendant could not assert the illegality of his abduction to defeat the jurisdiction of the court. However, the Court of Appeals noted that if the defendant could prove that "he was removed from the asylum state by governmental action, and therefore establish a treaty violation, she or he [could] object to trial in the United States." *Id.* at 307.

II. The Violation of the 1980 Treaty of Extradition Deprives the District Court of Personal Jurisdiction over the Respondent.

A. Respondent has standing to raise jurisdictional question.

International obligations do not ordinarily confer rights on individuals but rather on states. *See* American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 902 (1987). For extradition treaties in the United States, however, the rule has always been different.[8] United States courts have generally allowed individuals to challenge violations of the extradition treaties under which the United States gained jurisdiction over the person.[9]

Recently some United States courts have held that a defendant is barred from asserting violation of an extradition treaty as a jurisdictional defense unless the country of the defendant who

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[8] *See generally* John Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1465-66 (1988).

[9] *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (holding that an extradition treaty is "the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of the treaty"); *see also Ford v. United States*, 273 U.S. 593 (1927) (individuals seized on high seas have standing to claim treaty rights); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (same); *Cook v. United States*, 288 U.S. 102, 121 (1933) (owners of vessels seized in violation of treaty have standing to invoke treaty rights).

has been abducted protests his/her removal in violation of an extradition treaty with the United States. Nonetheless, these decisions indicate that a properly registered protest by an extradition treaty party gives standing to the abducted person to raise the treaty violation as a defense to jurisdiction.

This principle of United States jurisprudence was most recently borne out in *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.) *cert. denied*, __ U.S. __, 111 S. Ct. 1640 (1990). The trial court addressed the standing of a defendant to raise violation of an extradition treaty as a defense to jurisdiction. The defendant in *Matta-Ballesteros* was arrested in Honduras by Honduran troops accompanied by U.S. Marshals and delivered to a United States Air Force Base. *Id.* at 256. The defendant claimed that a bill introduced in the Honduran legislature protesting his arrest and transfer constituted a protest by the Honduran people. *Id.* at 260. The *Matta-Ballesteros* court concluded that without an "official protest" from the Honduran Government, the defendant did not have standing to assert violation of an extradition treaty as a defense to jurisdiction.

In *Jaffe v. Smith*, 825 F.2d 304 (1987), the Eleventh Circuit Court of Appeals considered a challenge to the jurisdiction of the trial court over a defendant who had been kidnapped from Canada. Canada officially protested the abduction by sending several diplomatic notes to the United States State Department.[10]

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[10] Canada sent diplomatic notes protesting the abduction on November 5 and December 22, 1981; February 15, March 5 and October 13, 1982; and June 15, 1983. The protests were acknowledged by Secretary of State George Schultz who stated:

> As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.

Statement of George Schultz to the Florida Probation and Parole Commission, (July 22, 1983), *reprinted in* Marian Wash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l. L. 200, 207-08

The *Jaffe* court dismissed the defendant's challenge to the jurisdiction of the trial court, not because the defendant did not have standing to assert the treaty violation as a defense, but rather because the court found that the United States Government was not involved in the kidnapping. *Id.* at 306-07. The court indicated that if U.S. officials had been involved in the abduction, the defendant would have had standing to assert the extradition treaty violation as a defense to the trial court's jurisdiction.[11]

Here, the Mexican Government has clearly and manifestly protested the kidnapping and abduction of Alvarez-Machain as a violation of the 1980 Extradition Treaty between the United States and Mexico. The District Court ruled that the Mexican protest vested Alvarez-Machain with standing to assert his abduction in violation of the 1980 Extradition Treaty as a defense to the court's jurisdiction.

The petitioner argues that the Ninth Circuit Court of Appeals mistakenly held that Alvarez-Machain had standing to raise the United States' violation of the 1980 Extradition Treaty because the express terms of the treaty do not provide that a protest of a treaty party allows an individual standing to allege a treaty violation. The petitioner further argues that the question of whether an individual defendant has standing hinges on whether the extradition treaty is self-executing to the extent that it confers enforceable rights on individuals. The petitioner concludes that

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(1984).

[11] Other courts have indicated that an official protest by a party to an extradition treaty that one of its citizens was removed from the party's territory in violation of the treaty would give a defendant standing to assert violation of the treaty as a defense to jurisdiction. *See United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981) (holding that "absent protest or objection by the offended sovereign, [defendant] has no standing to raise violation of [extradition treaty]"); *Waits v. McGowan*, 516 F.2d 203, 208 & n.9 (3rd Cir. 1975) (holding "International extradition is governed only by considerations of comity and treaty provisions. . . . The protections and or rights which accrue to the extradited person primarily exist for the benefit of the asylum nation" and "[t]he pleadings do not allege that Canada has objected in any way to the removal of [defendant] to this country.").

because the treaty does not expressly provide for *individual* rights and protections, it cannot be self-executing to allow an individual standing to assert the rights and protections the extradition treaty creates for the treaty parties.

This argument is not supported by case law or by the inherent nature of extradition treaties. United States courts have repeatedly held that extradition treaties constitute exceptions to the generally recognized international principle that a nation has a right not to surrender its own citizens to a requesting nation. *See* discussion of case law in Section I above. To that end, extradition treaties provide certain rights and obligations for the benefit of the treaty parties. In exchange, the parties agree they will give up their right not to surrender their citizens in certain situations. While it is true that it is up to the sovereign parties themselves to assert their rights under the extradition treaty, those rights would be meaningless if, when the party sought to enforce its rights, the rights had no practical effect on the actions of the other party.[12]

B. The District Court rightly exercised its inherent power to review its personal jurisdiction over respondent.

In the constitutional system of the United States, federal courts have traditionally been responsible for ascertaining their own jurisdiction. *See Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 274 (1926) (holding that every court of

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[12] *See* The Head Money Cases (*Edye v. Robertson*), 112 U.S. 580, 598-99 (1884):

> "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."

Id.

general jurisdiction has power to determine whether the conditions essential to its exercise of jurisdiction exist); *Frissell v. Rizzo*, 597 F.2d 840, 843 (3rd Cir. 1979) (observing that "[o]nce the court finds Art. III, or 'pure' standing, it must then determine whether the claim is barred by nonconstitutional, prudent limitations on the exercise of its jurisdiction"). The supremacy clause of Article VI of the United States Constitution makes treaties of the United States the supreme law of the land subject to consideration by United States courts. In addition, Congress envisioned the involvement of federal courts in administration of extradition treaties and the application of treaty provisions to procure custody of foreign nationals residing in foreign territories. *See* 18 U.S.C. § 3184 (1988). Pursuant to this congressional grant of jurisdiction, U.S. courts have power to apply and interpret extradition treaties. *See, e.g. In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984), *cited in INS v. Doherty*, ___ U.S. ___, 112 S. Ct. 719, 116 L. Ed. 2d 823, 60 USLW 4085, 4087 (1992). For these reasons, the Ninth Circuit Court of Appeals rightly concluded that the District Court was justified, independent of the standing of the defendant to raise the issue, to inquire into its personal jurisdiction over the defendant when the defendant's presence before the court was by reason of violation of the 1980 extradition treaty.[13]

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[13] In addition, the District Court had the ability to review its personal jurisdiction over the defendant by reason of its supervisory powers. *See McNabb v. United States*, 318 U.S. 332, 345 (1943) (holding that courts may exercise supervisory power to avoid becoming "accomplices in willful disobedience of law"); *United States v. Toscanino*, 500 F.2d at 276 (holding that where a defendant has been brought into the United States in violation of a treaty, the court may exercise its supervisory power "to remedy abuses of a district court's process"); *United States v. Lira*, 515 F.2d at 73 (Oakes, J. dissenting) (warning that "these repeated abductions invit[e] exercise of that supervisory power in the interests of the greater good of preserving respect for law"); *Ahmad v. Wigen*, 726 F.Supp. 389, 412 (E.D.N.Y. 1989) (holding that "courts may not be parties to abusive judicial practices, even where sensitive foreign relations matters are concerned . . . courts are not, and cannot be, a rubber stamp . . . in the exercise of extradition jurisdiction"), *aff'd* 910 F.2d 1063 (2d Cir.), *stay denied*, __ U.S. __, 111 S. Ct. 23, 111 L.Ed.2d 835 (1990).

C. The District Court correctly held that it lacked personal jurisdiction over respondent.

The petitioner argues that *Ker v. Illinois*, 119 U.S. 436 (1886), and its progeny mandate that the District Court cannot question the manner in which the United States obtained custody of the defendant. The *Ker* doctrine provides that the power of a court to try a person for a crime is not impaired by the means by which that person has been brought within the court's jurisdiction.[14] The District Court correctly held that *Ker* is distinguishable from this case. In brief, in order not to repeat the detailed analysis of *Ker* adequately set forth in other briefs in support of Alvarez-Machain's position, *Ker* is distinguishable for three main reasons:

1. *Ker* was not an extradition case. In fact, *Ker* confirmed that if an extradition treaty is in force it does matter how custody is obtained.[15]

2. There was no United States Government involvement in the abduction. The U.S. Supreme Court took pains to emphasize that the kidnapper was acting "without any pretense of authority

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[14] 119 U.S. at 444; *see also Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

[15] *Ker*, 119 U.S. at 443-44; *see also Toscanino*, 500 F.2d at 278 (holding that "*Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty.").

The seizure in *Ker* occurred following a Peruvian revolution; the existing extradition treaty could not be used because the courts and civil government were not functioning. *See* Charles Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l. L. 678, 686 (1953) (noting irrelevancy of treaty when foreign government willing to deliver).

under the treaty or from the government of the United States."[16]

3. There was no protest from the Government of Peru, the country from which the defendant in *Ker* was abducted. In fact, the government in power in Peru aided in the removal of the defendant, a United States citizen.[17]

United States courts have long held that courts cannot have criminal jurisdiction over persons detained as a result of treaty violations.[18] The Court of Appeals properly held that as a result of the abduction of Alvarez-Machain in violation of the 1980 Treaty and the protest of the Mexican Government, the *Ker-Frisbie* doctrine does not control.

D. The District Court's review of personal jurisdiction over the defendant does not involve a political question interfering with the Executive's conduct of foreign policy.

It is proper for this Court to address the issue of personal jurisdiction over the respondent under the power of the Court to

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[16] *Ker*, 119 U.S. at 443.

[17] *See* Fairman, *supra* note 15, at 685-86.

[18] *Rauscher*, 119 U.S. at 407, 419-20, 433 (holding that court had no jurisdiction to try defendant for crime other than one defendant was extradited for pursuant to treaty); *Cook v. United States*, 278 U.S. at 121-22 (holding that seizure of vessel in violation of a treaty deprived the court of jurisdiction); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (holding that jurisdiction cannot be based on custody obtained in violation of a treaty stating "'A decent respect for the opinions of mankind,' national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed – require that treaties shall not be reduced to mere 'scraps of paper.'").

interpret and apply provisions of the 1980 Extradition Treaty. Moreover, the jurisdictional review is proper in that it is not inquiring into some "political question," the determination of which would interfere with the Executive's conduct of foreign policy. Rather than interfere, the Court's inquiry into jurisdiction merely applies its inherent power of interpretation to the terms of the 1980 Extradition Treaty which the Executive purports to uphold as part of the laws of the United States. *See O'Connor v. United States*, 479 U.S. 27, 33-34 (1986) (Court considered course of conduct between parties and administration's application of the treaty as factors in the interpretation of a treaty provision); *Trans World Airline, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253-55 & n.26 (1984) (holding that "A treaty is in the nature of a contract between nations" and the interpretation of a treaty term "does not engage the 'political question' doctrine.").

To deem such an inquiry as "political" and inappropriate for the judiciary ignores a long line of precedent holding that "nonjusticability based on [a] 'political question' is *at best a limited* doctrine." See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis in the original), *cert. denied*, 470 U.S. 1003 (1985).

Modern case law on the political question doctrine derives from *Baker v. Carr*, 369 U.S. 186 (1962), which makes clear that the doctrine has only a limited use. In *Baker*, this Court held that the question whether a state legislative district apportionment plan violated the Constitution was not a political question and therefore was justiciable. In so holding, the Court rejected the notion that the doctrine rendered nonjusticiable all political cases, and instead observed that the nonjusticability of a question was "essentially a function of the separation of powers." *Baker*, 369 U.S. at 217. The Court then identified situations that might require application of the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable

> and manageable standards for resolving it; or the impossibility of deciding without anticipating determination of a kind clearly for nonjudicial indiscretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. Because the case at bar does not involve an issue of separation of powers, but rather the conduct of the Executive under a treaty, the rationale for invoking the political question doctrine is even weaker than the separation-of-powers rationale in *Baker*. In fact, the *Baker* opinion observes that the doctrine in no respect requires that all questions implicating foreign affairs be ruled political questions. *Baker*, 369 U.S. at 211.

Following *Baker*, U. S. courts have shown reluctance to apply the political question doctrine at all in matters involving the interpretation of extradition treaties. See, *e.g.*, *United States v. Doherty*, 786 F.2d 491, 492-93 (2nd Cir. 1986) *cited in INS v. Doherty*, *supra*, 60 USLW at 4087; *Quinn v. Robinson*, 783 F.2d 776, 790-791 (9th Cir. 1986); *In re Mackin*, 668 F.2d 122, 132-137 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 513-18 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

For instance, in *Eain*, the U.S. Government sought to keep the Seventh Circuit from reviewing the Executive's position on the extradition of a prisoner to Israel. Relying on *Baker*, the U.S. Government argued that the Seventh Circuit should abstain from reviewing extradition under the treaty at issue since there was potential embarrassment for the Executive if the court's reading of the treaty differed, and because there were "no judicially discoverable and manageable standards to guide the court's discretion." *Eain*, 641 F.2d at 515. The Seventh Circuit rejected this nonjusticiability argument noting that unless the Executive chooses to abrogate or otherwise terminate the subject

treaty, it should be available for review by the judiciary to adjudicate disputes. The Seventh Circuit could "construe [the] treaty and . . . find it provides the answer." *Eain*, 641 F.2d at 514 *quoting Baker*, 369 U.S. at 212.

The Seventh Circuit found the treaty issue justiciable even if its conclusions might differ with those of the Executive. "[T]he Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable 'political question.'" *Eain*, 641 F.2d at 515.[19] Finally, the court rejected the notion that there were no manageable standards with which to guide any inquiry into the matter of extradition. There was treaty language to interpret and courts have authority to construe treaties as they do other sources of United States law. See *Eain*, 641 F.2d at 515.

In re Mackin is similar to *Eain* and the case now at issue, since in *Mackin*, the U.S. Government told the Second Circuit that it lacked jurisdiction to review the political offense exception of the extradition treaty between the United States and Great Britain. The Second Circuit rejected this political question argument, insisting that the courts were as qualified as the Executive to apply the subject extradition treaty provisions upon review. *In re Mackin*, 668 F.2d at 132-134.

The Second Circuit reiterated the *Mackin* holding in *United States v. Doherty*, 786 F.2d at 493. The *Doherty* court, noting that the U.S. Government had abandoned its contention that the political offense exception of U.S. extradition treaties is

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[19] As the Seventh Circuit indicated in *Eain*, the judiciary has made numerous decisions that touch the nation's domestic and foreign policy concerns and implicate matters traditionally thought of as executive functions, sometimes to the chagrin of the Executive. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (permitting publication of Pentagon Papers in face of argument of threat to relations with allies); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (restricting executive discretion against claim of necessity to further international military policy). *See also Dennis v. United States*, 341 U.S. 494 (1951) (appraisal by court of international tensions and conditions in evaluating constitutionality of statute).

subject to interpretation solely by the Executive, upheld the extradition magistrate's denial of an extradition request based on the political offense exception. In *INS v. Doherty*, the Supreme Court observed that "[t]he attempts of the United States to attack [the extradition magistrate's] conclusion collaterally were rebuffed." *INS v. Doherty*, *supra*, 60 USLW at 4087.

In *Quinn*, the U.S. Government again argued unsuccessfully for a political question exception from judicial review of a prisoner's extradition proceeding. *Quinn*, 783 F.2d at 776. In *Quinn*, the Ninth Circuit rejected the government's political question argument. While recognizing the Executive's interest in matters "that touch on foreign policy," the court nonetheless chose to review the extradition treaty matter at issue because of the individual liberty concerns at stake. *Id.* at 788. The individual liberty interests in the case now before this Court -- liberty from government-sponsored abduction in violation of an extradition treaty -- are no less important than those in *Quinn* and require the same judicial review as exercised in *Quinn*.

From *Baker* through *Eain*, *Mackin*, *Quinn*, *Doherty* and other cases,[20] the progression of modern law on the subject of political question demonstrates the doctrine's inapplicability to the instant case. None of the situations listed in *Baker* apply to deprive this Court of the power to say what the law is regarding personal jurisdiction, or deprive it of the authority to interpret a valid extradition treaty.

First, the matter at bar does not involve the question of separation of powers, which most often is the basis for invoking the limited and narrow doctrine of political question. Instead, it

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[20] *See, e.g., Ahmad v. Wigen*, 726 F.Supp. 389, 412 (E.D.N.Y. 1989) ("Despite the fact that the executive branch has a constitutional duty and right to conduct foreign policy, and the legislative and executive branches together have the duty and right to enter into treaties for extradition, the courts are not, and cannot be, a rubber stamp for the other branches of government in the exercise of extradition jurisdiction."); *see also, Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796-98 (D.C. Cir. 1984) (Edwards, J., concurring) (political question doctrine is a very limited basis for non-justiciability and does not bar review of a tort claim for damages consequent to terrorist activities).

involves the interpretation of the 1980 Extradition Treaty, which the DEA violated with apparent impunity. Second, the Executive has the power to terminate a treaty; but if not terminated, this Court, as well as the Executive, may examine the treaty to find an "answer" to the question put to it: whether violation of the 1980 Extradition Treaty mandates that the District Court refrain from exercising personal jurisdiction over the defendant. Because the 1980 Extradition Treaty has not been terminated, it is a proper subject for interpretation by the Court. See *Trans-World Airline, Inc. v. Franklin Mint Corp.*, 466 U.S. at 254 n.26 (an examination of whether the U.S. acted consistent with a treaty does not engage the political question doctrine). Third, judicial review of personal jurisdictional matters does not "embarrass" nor does it show disrespect to coordinate branches of government, which have chosen as a matter of law not to terminate the 1980 Extradition Treaty. As the Supreme Court noted in *Baker*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Similarly, it would be error to suppose that the so-called "political question" in the present case bars this Court from reviewing and determining the proper exercise of personal jurisdiction over Alvarez-Machain.

III. Customary International Law Mandates the Return of Respondent to Mexico as the Remedy to the Violation of the 1980 Treaty of Extradition.

Customary international law forms an important part of United States law. The Supreme Court established in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." More recently, the Supreme Court acknowledged the "frequently reiterated" principle that federal common law is necessarily informed by international law. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

It is a well established rule that statutes and treaties be construed to be consistent with norms of customary international law unless Congress has clearly indicated its intent to renounce these norms. Chief Justice Marshall proclaimed that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804). That pronouncement has given rise to the presumption that:

> An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States [only] if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, § 115(1)(a) (1987).

Courts, in applying that principle, have interpreted treaties and acts of Congress so as not to conflict with norms of customary international law. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963) (statute construed to be consistent with State Department regulations and "well-established rule of international law") (*cited* with approval in *Weinberger v. Rossi*, 456 U.S. 25, 32 (1981)).

Consideration of international law principles in construing extradition treaties is particularly appropriate because, as noted by the Supreme Court in *Rauscher*, "[i]t is . . . very clear that this treaty did not intend to depart . . . from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty." *Rauscher*, 119 U.S. at 420. For these reasons, the remedy adopted for the United States' abduction of

Alvarez-Machain in violation of the 1980 Extradition Treaty must comport with principles of international law.[21]

Customary international law dictates that the abduction of another country's citizen in violation of an extradition treaty shall be remedied by the return of the citizen to his/her home country. See American Law Institute, *Restatement (Third) of the Foreign Relations Law at the United States* § 901 R.N.3 (1987). A survey of incidents involving international abductions indicates that in analogous situations, abducted persons are returned to the nation which protests the infringement of its sovereignty.

For example, in *The Jacob-Salomon* case, (1935), described in Lawrence Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l. L. 502, 502-04 (1935), Mr. Jacob-Salomon, a Swiss citizen, was kidnapped from Basel, Switzerland, by two German nationals who drove him across the border into Germany, where he was promptly arrested by German police. Switzerland lodged a diplomatic protest, asserting that "the abductors acted with the connivance of official German agencies," that one of them was a Gestapo agent, and that German officials anticipated the abduction. Id. at 503. The German Government refused to release the kidnapped person, alleging "'no evidence has been found that German authorities participated. . . .'" *Id.* at 504. Thereafter, Germany and Switzerland agreed to submit to arbitration. But before the tribunal made any decision, Germany conceded and Salomon was returned to Switzerland. *See* Lawrence Preuss, *Settlement of the Jacob Kidnapping Case*, 30 Am. J. Int'l. L. 123 (1936). This case illustrates that where the sovereignty of a nation has been infringed by persons acting on behalf of and with the encouragement of a foreign government, the kidnapped person

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[21] To determine the customary practice of nations when a defendant has been abducted in violation of an extradition treaty, U.S. courts begin with the sources identified by the Supreme Court in *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820): "The law of nations . . . may be ascertained by consulting the works of jurists, writing professionally on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law."

must be returned to the territory of the national from where he was taken -- a matter to which even Nazi Germany agreed.

In the *Schnaebele* case, *described in* 3 Travers, *Le Droit Penal International* (Paris 1924) No. 1302, Mr. Schnaebele, a French police official, was lured into Germany by a letter from a German police official requesting a meeting and purporting to grant safe-conduct. After Schnaebele crossed the border, German police arrested and imprisoned him. After a protest by the French Government, Prince Bismarck ordered Schnaebele's release because of the official involvement in luring Schnaebele from France.

In *The Blair Case* (1876), described in Preuss, 30 Am. J. Int'l. L., *supra*, at 124 n.6, a British citizen had fled to the United States from Britain, but was forcibly returned to Great Britain by a private detective who apparently acted in complicity with officials. After a protest by the United States Government, Great Britain returned Mr. Blair to the United States. Clearly, therefore, the United States has in the past insisted on the customary rule of international law that persons abducted from the territory of a sovereign nation with the help or encouragement of a foreign government must be returned to the offended nation.

In re Jolis, 7 Int'l L. Rep. Annual Digest 191 (1933-1934), involved a judgment of a French criminal court of first instance (tribunal correctionnel) in 1933. The accused, a Belgian citizen, visited a cafe in a French village and after he had left, it was found that cash was missing from the cash drawer. The owner of the cafe, suspecting the accused, called in two village constables (gardes-champetres) and together with them pursued the accused until they caught up with him across the frontier. The policemen detained the accused and brought him back to France. The Belgian Government lodged an official protest with the French Government against the arrest effected in Belgium by the constables and demanded the return of the accused. The Court of Avesnes decided to release the accused on the following ground:

> The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was

> completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof. The information leading to the proceedings of arrest . . . and all that followed thereon must therefore be annulled.

Id. at 191.

Particularly instructive is the celebrated abduction of Adolf Eichmann. After the kidnapping in 1960 of Adolf Eichmann in Argentina by Israeli nationals, the U.N. Security Council adopted a resolution, supported by the United States, which stated in part: "The Security Council . . . declares that acts such as that under consideration . . . affect the sovereignty of a Member State . . ." and which further requested Israel to make "appropriate reparation." S.C. Res., 868th mtg., U.N. Doc. S/4349 (June 23, 1960). Subsequently, Argentina reached a settlement of the incident with Israel. This settlement was of significance to Israeli courts in sustaining their jurisdiction over Eichmann. *See Attorney General of the Government of Israel v. Eichmann* (1961), 36 Int'l. L. Rep. 18 (1968), *aff'd sub nom. Eichmann v. Attorney General* (1962), 36 Int'l. L. Rep. 277 (1968), where the District Court stated:

> Considerable importance attaches to this statement in the present case, in view of the settlement of the dispute between Argentina and Israel. Whatever we may think of the general legal problem, now that the Governments of Argentina and Israel have issued their joint communiqué of August 3, 1960, to the effect that both Governments have decided to regard as closed the "incident" whereby the sovereignty of Argentina was infringed, there certainly remains to the accused in this case no right to base himself on the "infringed sovereignty" of the State of Argentina. The indictment in this case was filed after Argentina had exonerated Israel of violation of her sovereignty and there was no longer any breach of international law. In these circumstances the accused cannot presume to speak, as it were, on behalf of Argentina and claim rights which that sovereign State had waived.

Id. at 63. In the present case, there has been no such settlement and Mexico has not exonerated the United States of the violation of the extradition treaty.

Customary international law and practice dictates that where a nation has obtained jurisdiction over a defendant by reason of a state-sponsored abduction of the person from his homeland in violation of an extradition treaty and the sovereignty of another nation, the violation should be remedied by the return of the defendant. The United States will not suffer by the adoption of this standard, but rather will gain in the protection of the rights of its own citizens. The warning of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting), is still true today: "Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law."

CONCLUSION

The decision of the Ninth Circuit Court of Appeals holding that the District Court could not exercise personal jurisdiction over a defendant abducted from Mexico in violation of an extradition treaty and in the face of protest by the Mexican Government, should be affirmed.

Respectfully submitted,

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March, 1992.

FOR ARGUMENT

No. 91-712

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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---

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 37 of the Rules of this Court, Canada respectfully submits this brief as *amicus curiae* to urge the Court to affirm the decision below in favor of the respondent, for the legal reasons stated therein.

The petitioner and the respondent have consented to the submission of this brief, and their written consents have been lodged with the Clerk of the Court.

This brief does not address any contested factual matters, but it is premised on the judicial findings below that respondent was involuntarily abducted from the territory of Mexico through the efforts of officials of the United States government. Canada also does not discuss the application of extradition treaties to the *in personam* jurisdiction of American courts where an accused has been

involuntarily removed from the territory of another nation in an exercise of the War Powers.

INTEREST OF THE *AMICUS CURIAE*

The issues presented in this case could have a profound effect on Canada-USA extradition relations.

Canada files this brief out of concern for the practice of transborder abductions of fugitives contrary to law. Such abductions contravene fundamental principles of justice that Canada has sought to uphold. They conflict with Canada's sense of the way the return of fugitives with its great neighbor ought to be conducted. Abductions offend against Canada's view of the law in international affairs. Canada is concerned that the United States Government considers it permissible for a law enforcement agency, sworn to uphold the law, to violate a treaty relationship, the sovereignty and laws of a treaty partner and the rights of a fugitive resident of a treaty partner.

Canada has a long tradition of international cooperation through extradition treaties with the United States beginning with the Jay Treaty of November 19, 1794 between Great Britain and the United States. Since 1842, rendition has been governed by a series of agreements of which the extant Treaty of Extradition of December 3, 1971, 27 U.S.T. 985, T.I.A.S. No. 8237 ("Treaty") came into force on March 12, 1976. A Protocol to this Treaty, significantly broadening the types of offenses for which extradition could be granted, came into force on November 26, 1991.

The Treaty, on a reciprocal basis, establishes a comprehensive system for rendition of fugitives, describes the nature of offenses for which extradition may be sought, and guarantees every fugitive access to the courts of the requested nation in order to test the validity of a rendition request.

The Treaty is part of the law of Canada and was negotiated with the understanding by Canada that the agree-

ment would provide the exclusive means whereby Canada and her constituent provinces, and the United States and its constituent states would seek to obtain custody of fugitives from each other.

Because this case affects the construction of all of petitioner's extradition treaties it raises doubt concerning the correctness of Canada's perception of the mutually agreed upon manifest scope and purpose of the Treaty.[1] Moreover, in this case, the United States seeks the *imprimatur* of the Court to abrogate if necessary, the right of Canadian citizens and others to access Canadian courts, contrary to its solemn undertaking in the Treaty to respect that right.

Canada and the United States enjoy an undefended border more than 3000 miles in length. The ease with which this border may be crossed accounts for the fact that approximately 50% of all American requests for extradition are made to Canada. In 1991, the United States made 74 requests for extradition to Canada and Canada made 47 requests to the United States. Many of these requests emanate from state and local authorities. Transborder incidents, involving bounty hunters, resulted in an exchange of notes in 1988 between Secretary of State George P. Shultz and Secretary of State for External Affairs Joe Clark in an attempt to partially resolve the problem. The position adopted by the petitioner in this case, however, raises a potentially far more serious problem; the spectre not only of federal, but more likely of

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[1] According to newspaper reports, the United States' view generally coincided until recently with that of Canada. See Michael Isikoff, *U.S. "Power" on Abductions Detailed*, The Washington Post p. A14 (August 14, 1991), contrasting views expressed by the U.S. Department of Justice's Office of Legal Counsel in written opinions prepared in 1980 and in 1989 by then Assistant Attorneys General John M. Harmon and William P. Barr, respectively. See *Symposium*, 24 Cornell Int'l L.J. 52 (1991) (analyzing the two opinions in detail).

official state and local incursions to abduct fugitives, where extradition is seen as too costly, too slow or unavailable, in violation of Canada's territorial integrity. This unlawful conduct would in effect be sanctioned in United States law by a decision favoring petitioner.

Canada has an interest in ensuring that its treaties are given that construction and application which their express terms, nature, scope and purpose require. Moreover, Canada has an interest, indeed an obligation to its citizens, in taking all steps necessary to protect the rights of its inhabitants and its sovereign interest in its territorial integrity, guaranteed by the Treaty and international law.

SUMMARY OF ARGUMENT

Canada submits that the current position of the United States departs from established practice in the relations between the United States and Canada, and among other nations, on which many extradition treaties have been built. Ultimately it departs as well from common sense underpinnings of all such treaties, which is to substitute the rule of law for force in such matters as national sovereignty, the right to give asylum, and the orderly cooperation in the enforcement of criminal laws.

Canada views transborder abductions from Canada to the United States as breaches of the Canada-United States Extradition Treaty and breaches of Canada's sovereignty. Other civilized nations, as well, would not agree with the position of petitioner in this case; they would insist that unless a nation otherwise consents to a removal of a person from its territory, an extradition treaty is the exclusive means for a requesting government to obtain such a removal and that it is the policy of nations to request return of abducted persons. Canada and its component governments do not hold to a policy of abductions from American territory, and if abductions occur, they could not reasonably expect the United States to acquiesce

in Canadian courts' disrespect of U.S. sovereignty through exercise of jurisdiction over abducted individuals. The Government of Canada would, upon protest, cooperate to obtain the return of an abducted fugitive.

ARGUMENT

EXTRADITION TREATIES INCORPORATE THE USAGES OF CIVILIZED NATIONS WHICH REJECT PETITIONER'S POSITION.

In the United States "[i]nternational law is part of . . . law, and must be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964). In Canada's view, this is such a case and hereafter, we set forth the law, customs and usages of civilized nations which suggest that official abductions are unlawful and require restitution of the *status quo ante*. Just as such usages would be considered to be incorporated in a domestic contract, see *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 221-22 (1979), they are part of the background reflecting the common understanding of nations, including Canada, in entering into extradition treaties.

Canada has consistently maintained the position both in diplomatic correspondence and in oral representations that transborder abduction from Canada to the United States constitute breaches of the Canada-United States Extradition Treaty. For example, a Canadian Embassy Note of October 13, 1982 to the Department of State, which referred to a Canadian Department of Justice Memorandum of Law which had been delivered to the United States Department of Justice, stated: ". . . under U.S. law, the Federal Government of the U.S.A has the obligation to assist Canada by commencing proceedings leading to Jaffe's return to Canada. This obligation is

based on the violation of the Canada-U.S.A. Extradition Treaty, a violation attributable to the '. . . actions of state officials or from the actions of those persons who act at the instigation of and/or under color of authority of a State . . .' ". *Appendix*, p. 9a. Most recently, in a note dated April 24, 1991 to the United States Embassy in the Hills case, the Department of External Affairs stated: "The Extradition Treaty, along with the relevant multilateral conventions, if any, established the only means under which to obtain the return of fugitive offenders." *Appendix*, p. 7a. Both cases giving rise to the representations are discussed below.

Hereafter, Canada sets forth a survey of some of the incidents and expressions of policy which show the understanding in international law that abducted persons must be returned to a nation when it protests the infringement of its sovereignty. The survey describes incidents which have arisen between various civilized nations, and then turns to incidents specifically involving the United States and Canada, in each instance summarizing relevant policy expressions as well. All seem to reflect a clear acceptance of the principle which petitioner is seeking to pretermit, regardless whether the incidents were settled juridically or diplomatically or whether policy statements are involved.

1. Particularly instructive is the case of *R. v. Bow Street Magistrates, Ex Parte Mackeson*, 75 C.A.R. 24 (1981). In this case, as a result of steps initiated by English police authorities, a British subject was deported from "Zimbabwe-Rhodesia" to the United Kingdom in a blatant attempt to evade the provisions of the Fugitive Offenders Act of 1881, an act of Parliament which regulated extradition among Commonwealth nations. The Lord Chief Justice prohibited Mackeson's prosecution on the ground that the provisions of the 1881 Act should have been followed citing with approval the decision of the High Court of New Zealand in *Ex parte Hartley* [1978] N.Z.L.R. 199, where a New Zealand citizen—in-

stead of proper extradition being sought—at the request of New Zealand police authorities had been put on an airplane in Australia and sent back to New Zealand.[2]

French courts also subscribe to the principle that official transborder abductions must be judicially rectified. See *In re Jolis*, 7 Ann. Dig. 191 (Tribunal Correctionel D'Avesnes 1933); *Matter of Nollet*, Journal du Droit Int'l. 1188 (Court d'appel de Douai 1891). But see *Re Argoud*, 45 I.L.R. 90, 95-97 (Cour de cassation 1964).

Earlier German recognition of the principle that official transborder abductions must be rectified by repatriation, is reflected in the *Schnaebele* and the *Jacob-Salomon* cases. In the *Schnaebele* case, described in III Travers. *Le Droit Penal International* 151-54 (Paris 1924), a French police official was lured across the border by a promise of an official safe-conduct. Ten days after his arrest in Germany, the Imperial German Government ordered Schnaebele's release because of the official promise of safe-conduct, after a French protest. In the *Jacob-Salomon* case, a stateless person was kidnapped in Switzerland by a Gestapo agent and taken to Germany. Germany resisted Swiss protests on the ground that there was an absence of proof concerning official German involvement. Switzerland then invoked compulsory arbitration and, before a decision was rendered, Germany conceded and returned the abducted person. Preuss, *Kidnaping of Fugitives From Justice On Foreign Territory*, 29 Am. J. Int'l. L. 502, 502-04 (1935); Preuss, *Settlement of The Jacob Kidnaping Case*, 30 Am. J. Int'l. L. 123 (1936).

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[2] Petitioner's reliance on earlier British cases, e.g., Pet. Br. 14 n. 9, and 30 n. 25, must be assessed in light of *Ex parte Mackeson*. While it is true that British courts follow the reasoning that presence of an accused confers jurisdiction, even though there was a transborder abduction, official evasion of statutory extradition procedures results in staying of the prosecution. In the United States, of course, extradition treaties have the force of law. *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (explaining the differing status of treaties under American and British law).

In connection with the transborder abduction, in 1981, of a Canadian citizen by American bounty hunters acting—according to evidence available to Canada—pursuant to a plan conceived by Florida officials, the Canadian Department of External Affairs queried competent officials of other nations and requested their comments concerning official transborder abductions. A similar survey was made in 1992. Replies were received from Australia, Austria, Britain, Finland, Germany, The Netherlands, Norway, New Zealand, Sweden and Switzerland. All countries indicated that they would regard such an abduction as a violation of their sovereignty and would protest. All countries indicated that they would regard such abductions as a violation of international law. Swiss officials stated that an officially sponsored abduction, in the context of existing rendition procedures and treaties, would be considered by them a violation of the principle of "loyalty and good faith" recognized in international law. Australia, Britain, Norway, Sweden and New Zealand consider it a violation of bilateral extradition treaties. Britain, Finland, Germany, and The Netherlands, would demand the return of the abducted person. If an abducted person were returned to their territory, and brought before their courts, Austria, Finland, The Netherlands, Norway, Sweden and Switzerland would consider that the abducted person should be returned.

Without doubt, therefore, the position of the petitioner herein diverges substantially from generally accepted norms of international conduct and appears contrary as well to the custom under which the Canadian and United States governments have heretofore informally resolved analogous matters, which we will now examine.

2. In dealing with one another, Canada and the United States have traditionally subscribed to the principle that —in the face of a protest—an official transborder abduction must result in repatriation.[3] Such a custom or usage

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[3] Only two incidents appear to diverge: *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), aff'd *sub nom. Unverzagt v.*

is, of course, a legitimate source for ascertaining the obligations of nations. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

C. Cole, *Extradition Treaties Abound But Unlawful Seizures Continue*, Int'l Perspectives 40 (Can. Dept. of Ext. Affairs, March-April 1975), contains a summary of a number of such incidents to the date of publication. Among others, Cole reported the cases of *Lafond* (1908) and *Marker* (1909), each of which involved an official transborder abduction from the United States to Canada. In each case following United States protests and demands for repatriation, criminal proceedings were stayed by Canadian authorities and the abducted person was repatriated. *Id.* at 40, 41.

Other cases, all involving official abductions from United States territory to Canada, and a subsequent repatriation and staying of a criminal proceeding following United States protests, were: *Grogan* (1841), involving a seizure by British soldiers, O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 British Yearbook of Int'l L. 279, 294 (1960); the *Convict Case* (1876), referred to by former U.S. State Department Legal Adviser Abraham D. Sofaer, in *Hearing on S.1373, S.1429, and S.1503 Before the Subcommittee on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 69 (1986), involving transportation of a convict through Alaska; and the *Unidentified Youth Case*

Benn, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 56 (1925), and *R. v. Walton*, 11 Ont. L.R. 94, 10 C.C.C. 269 (1905). Both cases involved officially sponsored transborder abductions. Significantlly, however, the Canadian Government has been unable to find any record of a diplomatic protest in the former case and there was no diplomatic protest in the latter case. Moreover, *Walton* was decided before adoption, in 1981, of the *Canadian Charter of Rights and Freedoms*, which in Section 7 provides that everyone has the right to life, liberty and security of the person and is not to be deprived thereof except in accordance with fundamental justice. A. LaForest, *Extradition To and From Canada* 47 (1991). There has been no judicial construction of the effect of the *Charter* provision on abduction cases.

(1892), involving the kidnapping of a 15 year old from New York and his detention in a Canadian reformatory. 4 J. Moore, *A Digest of International Law* 330 (1906).

On the converse of the coin, Cole describes the *Kahosed Case* (1960), involving the arrest of two Canadian Indians on Canadian territory by Michigan State Police. Cole, *op. cit.* at 41. While both defendant entered pleas of guilty to United States criminal charges, nevertheless, on the insistence of the Canadian government, thereafter the United States government notified the authorities of all U.S. states bordering on Canada to avoid future incidents of this nature.[4]

Cole also describes the *Anderson Case* (1974), where on August 24, 1974 James Anderson on driving across the border at Bellingham, Washington was identified by U.S. officials as a U.S. Army deserter and asked that he come inside for examination. Anderson immediately left his car and ran back across the border. He was pursued by U.S. officials and apprehended on Canadian Territory. He was forcibly taken back across the border and turned over to the Federal Bureau of Investiagtion. Following a protest by the Canadian government, Anderson was returned to Canada on August 30, 1974. *Id.* at 42.

Since Cole's report, there have been two other incidents of significance involving official transborder abductions from Canada to the United States. Prior to them, Canada had no notice that the United States regarded its extradition treaty obligations to be other than exclusive.

On September 24, 1981, agents of an American bonding company abducted Sydney Jaffe, a Canadian citizen, from Toronto, Ontario and returned him to Florida for

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[4] This action was markedly similar to Secretary Blaine's action in 1881, exhorting the Governor of Texas to abide by and not to evade the extradition treaty between Mexico and the United States, referred to at Pet. Br. 29 n. 24. Hence, petitioner can find no solace in the fact that Secretary Blaine's letter antedated the decision in *Ker v. Illinois*, 119 U.S. 436 (1886).

trial on fraud charges. In some fifteen diplomatic notes dating from 1981 to 1986, the Canadian government alleged that the abductors had acted pursuant to a plan promoted by officials of the State of Florida and under color of authority of that state and demanded Jaffe's return and restoration of the *status quo ante*. The United States government declined to take a position whether the abduction had been officially endorsed. But the U.S. Department of Justice and the U.S. Department of State requested the Florida Probation and Parole Commission to grant Jaffe an early release. In this context, the Secretary of State wrote on July 22, 1983, that:

> As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty. *Appendix*, p. 2a.

Jaffee was granted an early release and returned to Canada in 1983.[5]

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[5] When on June 27, 1983, Canada filed a *habeas corpus* action, *i.e.*, *Canada v. Wainwright, et al.*, Misc. No. 83-661-Civ. J-16 (M.D. Fla.), in a U.S. Department of State note dated December 19, 1983, which in summary form was submitted to the District Court in the context of the action, the United States informed Canada that it had no objection to Canada's filing of that action. Nevertheless, although the Court of Appeals for the Eleventh Circuit suggested that the District Court invite the United States to intervene, see *Canada v. Wainwright, et al.*, No. 85-3248 (April 11, 1985), neither such an invitation nor such an intervention resulted. In its Order, the Court of Appeals expressed some doubt, without deciding, whether a petition by Canada for a writ of *habeas corpus* could be entertained, but held that "Canada has properly invoked the jurisdiction of the district court to entertain a claim arising under a United States treaty." In 1986, the U.S. District Court nonetheless dismissed Canada's action on the alternative grounds that Canada lacked standing to maintain the action, and that a political question was presented. *Canada v. Wainwright, et al., supra* (M.D. Fla., Jan. 31, 1986). Jaffe's own *habeas corpus* action failed in the

In the wake of the Jaffe case, the United States undertook in relation to "bounty hunter" abductions only to consult on the return of abducted persons to Canada. See *Appendix*, pp. 5a-7a.

In April 1991, the United States took the formal and unequivocal position *vis-a-vis* Canada that, as it maintains in this case, return of a criminal defendant is not an appropriate remedy under circumstances of an official abduction. As indicated in this brief, there have been numerous instances in both countries where persons abducted from one have been returned following protest by the other.

Notification took place in the case of *Derrick Hills* who, on January 4, 1991, was apprehended by a Windsor City police officer, some two hundred yards within the United States, in the Windsor-Detroit tunnel. The United States lodged a protest and requested a statement of Canadian intentions. The note asserted, apparently gratuitously, that "under United States law judicial dismissal of criminal charges, or judicially ordered release . . . is not an appropriate remedy for a violation of territorial sovereignty." [6]

Canada rejected the American position and indicated its understanding that the extant extradition treaty "established the only means under which to obtain the return of fugitive offenders." [7] Canada apologized and Hills was returned to American territory to await a

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absence of proof of official involvement in his abduction. *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987). The abductors were extradited to Canada. *Cf., Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983). The merits of Canada's suit were never reached.

[6] *U.S. Embassy Note No. 94 of April 8, 1991.* Diplomatic custom precludes publication of another government's communications not otherwise made public. However, a quotation is permissible in circumstances where paraphrasing may be misleading.

[7] *Department of External Affairs Note No. JLAC-0734 of April 24, 1991*, reproduced in our *Appendix*, p. 7a.

proper extradition request. Thereafter, the United States expressed its satisfaction concerning the resolution of Hills' case but indicated its disagreement with the Canadian position concerning exclusivity of the Treaty.[8]

As manifested by the incidents detailed, upon protest, it has been the consistent policy of Canada to view its obligations under the treaty as requiring the return of an abducted person. In this effort, provincial governments have consistently cooperated. Hence, intervention of Canadian courts had not even been necessary.

There can be no doubt that the current position of the petitioner represents a belated departure from the common understanding of civilized nations as to the function and scope of extradition treaties. In effect, the Executive Branch of the United States Government seeks the right, on a case by case basis, to disavow obligations it assumed with the consent of the United States Senate. Such a position is not based on law, and would give any nation entering into a treaty with the United State concern as to its implementation. In the long run, it would breed suspicion and lack of cooperation in the enforcement of criminal laws, and thus defeat the purposes for which apparently it is offered.

Canada and the United States have a vital interest in the continuing efficiency of the law enforcement activities centering on the Extradition Treaty. Approximately half of all American requests for extradition are made to Canada, and former Secretary of State George P. Shultz indicated that "Canada is our most important extradition treaty partner and . . . the maintenance of the excellent extradition relationship we have had with Canada is greatly in the law enforcement interest of . . . the . . . states, as well as of the federal government". *Appendix*, p. 3a.

Under the common legal tradition of the United States, Canada, and other nations, the decision as to whether to

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[8] *U. S. Embassy Note No. 133 of May 23, 1991.*

adhere to a law or treaty should not be left to the discretion of the particular Executive officials in office. Laws and treaties must, and do, have a more solid foundation, see, *e.g.*, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), and this Court should not approve the petitioner's present effort to restrict their efficacy.

To do so would raise genuine concern that the long standing practice of returning persons abducted by the United States is imperilled. Of equal concern is the danger that a decision by the Court in favor of the petitioner would impart to officials in the United States, particularly at the State and local level, the impression that this Court has sanctioned the practice of unlawful abductions across the Canada-United States border.

Canada will continue to protest such abductions when they occur and to seek the extradition and prosecution of those responsible, whether they be private individuals or federal, state or local law enforcement officers. A decision by the Court to dismiss petitioner's application would virtually eliminate the possibility that Canada would be forced into such an undesirable situation.

CONCLUSION

For the foregoing reasons, Canada urges the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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March 1992

APPENDICES

APPENDIX A

Statement of Secretary Shultz, June 22, 1983

STATE OF FLORIDA
PROBATION AND PAROLE COMMISSION

IN RE: SIDNEY LEONARD JAFFE
INMATE #082007

STATEMENT OF GEORGE P. SHULTZ,
SECRETARY OF STATE

I urge you to grant parole to Sidney Jaffe on the ground that his continued incarceration will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida to face the charges which resulted in his imprisonment.

The circumstances of Mr. Jaffe's return from Canada to Florida were examined in the opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Middle District of Florida in the cases of Daniel Kear and Timm Johnsen, respectively. In brief, the courts found that Kear and Johnsen were extraditable to Canada, a showing having been made of probable cause to believe that the two "bounty hunters," who were acting as agents of the company that had posted bond for Mr. Jaffe, had kidnapped Jaffe in Toronto, Canada and had brought him back to Florida.

The United States has an extradition treaty with Canada. That treaty could have been utilized to secure

Mr. Jaffe's return; no one has suggested the contrary. How, then, did it happen that Mr. Jaffe was returned by Kear and Johnsen? Canada, in a petition for writ of habeas corpus filed in the United States District Court for the Middle District of Florida, alleges that Kear and Johnsen were "acting pursuant to a plan promoted by officials of the State of Florida and under the color of authority of the State of Florida." The officials of the State of Florida whose conduct has been called into question by Canada deny the charges, I understand, and I do not now take any position on the question whether there was state action or involvement in the alleged kidnapping of Mr. Jaffe.

However, failure to utilize our extradition treaty with Canada to secure Mr. Jaffe's return does appear to be attributable to the Office of State Attorney Stephen L. Boyles, according to the report to Governor Graham prepared by the Governor's General Counsel. On May 18, 1981, when Mr. Jaffe failed to appear, Judge Perry ordered the State Attorney to initiate extradition proceedings. Any request for Mr. Jaffe's extradition would have been made by the Governor on the basis of supporting materials prepared by the State Attorney's office. Documents submitted by the State Attorney's office were found by the Governor's office to be legally insufficient to support a request for Mr. Jaffe's extradition on July 2, and again on July 23, 1981. Mr. Jaffe was returned from Canada under the circumstances of which Canada complains on September 24, 1981. In the intervening two months the State Attorney's Office failed to make any further effort to submit legally sufficient documentation to the Governor's office in support of a request for Mr. Jaffe's extradition.

As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada con-

siders a violation of the treaty and of international law, as well as an affront to its sovereignty.

I wish to emphasize that Canada is our most important extradition treaty partner and that the maintenance of the excellent extradition relationship we have had with Canada is greatly in the law enforcement interest of Florida and the other states, as well as of the federal government. Indeed, in the last three full calendar years, sixty per cent of the fugitives surrendered to the United States pursuant to extradition requests made by states, as opposed to the federal government, were surrendered by Canada.

Moreover, quite apart from law enforcement cooperation, the Jaffe case threatens to have a generally deleterious effect on our relationships with Canada. Canadian authorities have raised this matter in virtually every recent high level contact between our two nations. It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most important and highly valued neighbors, allies and trading partners.

For the foregoing reasons, I urge you to grant parole to Sidney Jaffe.

/s/ George P. Shultz
GEORGE P. SHULTZ
Secretary of State

July 22, 1983
Date

APPENDIX B

Letter of Secretary Shultz, January 11, 1988

THE SECRETARY OF STATE

WASHINGTON

January 11, 1988

Dear Mr. Minister:

I refer to the Protocol Amending the Treaty on Extradition between the United States and Canada we signed today and have the honor to address to you the following.

The United States and Canada recognize that the transborder abduction of person found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters", is an extraditable offense under the United States—Canada Extradition Treaty.

Where a person has been charged with or convicted of such an offense in Canada and is found within the jurisdiction of the United States, the United States agrees, upon request, to commence extradition proceedings against such a person pursuant to the Treaty in order that the person may be returned to Canada.

The United States will use its best efforts to honor Canadian requests for testimony, information, or other assistance pertaining to such abductions.

Canada and the United States agree to cooperate to deter such transborder abductions. To assist in achieving that purpose, the United States will continue to exert its best efforts to inform those engaged in business as bail bondsmen or bounty hunters and other interested parties of the positions set forth in this exchange of letters.

Canada and the United States agree to consult promptly concerning any case of transborder abduction involving bounty hunters which might arise in the fu-

ture. The purpose of such consultations shall be to address matters relating to any such case, including any request by the Government of Canada for the return of the person so abducted. In the event of return, the Governments agree to co-operate to have the abducted person escorted to Canada and taken into custody at the border, pursuant to a request for provisional arrest, pending the outcome of extradition proceedings. For the purpose of these consultations, the principal law enforcement contact for the United States will be the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

I have the honor to propose that this letter and your reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Sincerely yours,

/s/ George P. Shultz
GEORGE P. SHULTZ

The Right Honorable

Joe Clark, P.C., M.P.,
Secretary of State
For External Affairs of Canada,
Ottawa.

APPENDIX C

Letter of Secretary Clark, January 11, 1988

THE RT. HON. JOE CLARK, P.C., M.P.
SECRETARY OF STATE FOR EXTERNAL AFFAIRS

CANADA

Ottawa, January 11, 1988

JLA-0026

Dear Mr. Secretary:

I have the honour to acknowledge receipt of your letter of today's date concerning transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters". I accept your proposal that your letter and this reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Yours sincerely,

/s/ Joe Clark

The Honorable George P. Shultz
Secretary of State of the
United States of America

APPENDIX D

Department of External Affairs Note No. JLAC-0731, April 24, 1991

No. JLAC-0734

The Department of External Affairs presents its compliments to the Embassy of the United States of America and has the honour to refer to the Embassy's Note No. 94 of April 8, 1991, concerning the arrest at the United States end of the Windsor-Detroit Tunnel of an American citizen, Derrick Hills, by a Canadian police officer. The note expressed the concern of the Government of the United States about this purported infringement of its territorial sovereignty. In that context, the Embassy requested Mr. Hill's release.

Under International Law, States are obliged to refrain from performing jurisdictional acts, such as arresting fugitives accused of a crime, within the territory of other States except by virtue of general or special permission. Investigation by the competent Canadian authorities has established that the arrest occurred in the United States and, therefore, the Government of Canada regrets this infringement of the territorial soverignty of the United States.

The Department of External Affairs, through the Department of Justice, requested the Attorney General of Ontario to seek the release of Mr. Hills. The Attorney General of Ontario agreed to the request. As a result the proceedings were stayed and Mr. Hills was released on April 16, 1991.

The Treaty on Extradition between Canada and the United States (Amended by an Exchange of Notes) of December 3, 1971 was negotiated, inter alia, to make more effective the cooperation between our two countries in law enforcement matters. The Extradition Treaty, along with the relevant multilateral conventions, if any,

established the only means under which to obtain the return of fugitive offenders.

It is the understanding of Canadian authorities that Mr. Hills returned to the United States. Documentation in support of a request for Mr. Hill's provisional arrest and extradition under the Treaty was prepared and forwarded through normal channels Mr. Hills has been arrested pursuant to the Canadian request. The Government of Canada appreciates the continued cooperation of the Government of the United States in the execution of this request.

The Government of Canada looks forward to continuing the extensive bilateral cooperation between our two governments in these matters.

The Department of External Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

OTTAWA, April 24, 1991

APPENDIX E

Canadian Embassy Note No. 542, Ocotber 13, 1982

The Embassy of Canada presents its compliments to the Department of State and has the honour to inform it that the Embassy has been instructed to remind the Department of State that a reply has not been received to the Memorandum of Law of the Canadian Department of Justice which was left with Associate Attorney General Guiliani on August 6 1982 during a meeting with Canadian officials and Mr. Axel Kleiboemer, Counsel to the Attorney General of Canada. In this connection, the Embassy understands that the letter dated August 9, 1982 from Attorney General William French Smith to former Attorney General of Canada Jean Chretien has been superseded in view of the above mentioned August 6th discussions with Mr. Guiliani.

The Department of Justice Memorandum of Law had requested that the U.S. Department of Justice initiate Habeas Corpus proceedings with a view to obtaining Mr. Jaffe's release and return to Canada. The memorandum had submitted that under U.S. law, the Federal Government of the U.S.A. has the obligation to assist Canada by commencing proceedings leading to Jaffe's return to Canada. This obligation is based on the violation of the Canada-U.S.A. Extradition Treaty, a violation attributable to the ". . . actions of state officials or from the actions of those persons who act at the instigation of and or under color of authority of a state. In Jaffe's case, Johnsen and Kear, who, as a matter of law, had no rights as bondsmen, acted at the instigation of and under color of authority of the State of Florida".

In this connection, the attention of the Canadian authorities has been drawn recently to the parties briefs in the case of Accredited Security and Casualty Company, Inc., Appellant vs State of Florida and Putnam County Florida, Appellees. Relevant documentation is at-

tached. Attached also is a copy of a letter dated September 24, 1982 from the law firm of Dearing and Smith of Tallahassee, Florida to the Honourable D. Lowell Jensen, Director, Criminal Division, U.S. Department of Justice commenting on the question of "state action" by the Florida authorities. In the view of the Canadian authorities, this material provides additional substantiation of complicity by the Florida authorities in the activities of Messrs. Johnsen and Kear resulting in the abduction from Canada of Sidney Jaffe.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.

October 13, 1982

No. 91-712

In the Supreme Court
OF THE
United States

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,
vs.
HUMBERTO ALVAREZ-MACHAIN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 91-712

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

VS.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAS WATCH IN SUPPORT OF RESPONDENT

Pursuant to Rule 36 of the Rules of this Court, Americas Watch respectfully submits this brief as *amicus curiae* in support of Respondent Dr. Humberto Alvarez-Machain.

The Petitioner and Respondent have consented to the submission of this brief, and their written consents have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Americas Watch is a non-partisan, non-governmental human rights organization that investigates, documents and publicizes systematic violations of human rights in

the Americas, including those committed by the governments of Mexico and the United States. Americas Watch reports on torture, disappearances, political killings, imprisonment or exile for non-violent speech or association, press censorship, and other violations of civil and political rights. Americas Watch is a division of Human Rights Watch, which also includes Asia Watch, Africa Watch, Middle East Watch and Helsinki Watch.

Although it is not a law firm, Americas Watch has lawyers on its staff and has been counsel in lawsuits before both United States courts and the Inter-American Court and Commission on Human Rights that have raised international law questions within the scope of its mandate.

This case presents a matter of first impression: Do United States courts have jurisdiction to prosecute an individual who has been forcibly abducted from another nation by United States agents, physically and psychologically mistreated, and brought to this country in violation of an extradition treaty and international law, when the other nation formally protests and requests the person's return. At the heart of this case is the need to preserve a well-established international system for protecting individual rights. Protection of those rights is one of the bases for the principle of territorial sovereignty. The issue is not solely that one state has violated the territorial sovereignty of another, but that the abducted individual is facing prosecution without the protection of his state, which has a duty to safeguard the individual rights of its citizens and those located within its territory. To circumvent the sovereign state — in this case by bypassing an extradition treaty — without showing that the state inadequately fulfilled its duty to prosecute criminal offenders on its territory, is to strike at the principle

international mechanism for preventing murder, torture, kidnapping, arbitrary arrest and other abuses during the apprehension and prosecution of criminal suspects. Because of the challenge posed by United States agents in this case to this first line of defense for the rights of an individual facing prosecution, Americas Watch has a vital interest in this case.

In addition, through its work in connection with the dramatic transitions from dictatorial regimes to democracies that have occurred in the Western Hemisphere in the past decade, Americas Watch has developed expertise regarding appropriate remedies for violations of international law. In this brief, Americas Watch argues that under international law, the appropriate remedy for the United States government's illegal actions in this case is Respondent's return to Mexico.

STATEMENT OF THE CASE

Respondent Dr. Humberto Alvarez-Machain, a Mexican national, is under indictment in the United States on charges related to the torture and murder in Mexico of United States Drug Enforcement Administration Special Agent Enrique Camarena Salazar. In April 1990, Alvarez-Machain was forcibly abducted from his medical office in Guadalajara, Mexico by five or six armed men who he took to be Mexican police officers, *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990), but who, it subsequently was determined, were paid agents of the United States government. *Id.* For more than 20 hours, Alvarez-Machain was held incommunicado and physically and psychologically abused.[1] He was involuntarily trans-

[1]The abduction process was very similar to the beginning of the process by which hundreds of Mexicans disappeared in the 1970s and

ported to the United States, where he was arrested by federal officials. *Id.*

The abduction, which received intense and continuous press attention in Mexico, outraged the people of Mexico. The Mexican Senate passed a resolution condemning the kidnapping and the Mexican government filed a series of diplomatic notes with the United States government protesting the abduction and demanding Alvarez-Machain's return. (J.A. 33, 35, 36). The Mexican government filed criminal charges against several Mexican nationals who allegedly participated in the kidnapping; it also formally requested the extradition of U.S. Drug Enforcement Agents Hector Berrellez and Antonio Garate Bustamante to face charges relating to Alvarez-Machain's abduction. 745 F. Supp. at 604. *See also* Brief for the United Mexican States as *Amicus Curiae* in Support of Granting Review at 9.

At the time of the kidnapping an extradition treaty between the United States and Mexico was in effect.[2] Under Article 9 of that treaty, the contracting parties are not required to deliver their nationals to the country requesting extradition; but if they refuse to extradite them, they are bound to submit the case to their own country's competent authorities for prosecution.

The United States government never formally requested Alvarez-Machain's extradition under the treaty. Rather, the government argues that to do so would be futile since Mexico does not extradite its citizens. Open-

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early 1980s; isolated instances of disappearance in Mexico continue to this day. Americas Watch, *Human Rights in Mexico: A Policy of Impunity* 35 (1990).

[2]1980 Extradition Treaty between the United States and Mexico, May 4, 1978, 31 U.S.T. 5039, T.I.A.S. No. 5200.

ing Brief of Petitioner at 21. Had the United States invoked the extradition treaty, Mexico would have been required to prosecute Respondent for the alleged acts that occurred in Mexico. The United States has made no showing that Mexico would have been unwilling or unable to fulfill its obligation under the extradition treaty to prosecute Respondent in Mexico, had a formal extradition request been made. The Mexican government has consistently stated that it will honor its obligations under the treaty with respect to Respondent. (J.A. 70-71).

SUMMARY OF ARGUMENT

The government's abduction of Alvarez-Machain undermines the sovereignty-based system for protecting individual rights because it was done in a way that precluded Mexico from exercising its duty to protect the rights of individuals facing prosecution.[3] A long line of international cases show that when a government abducts a person from the territory of another, without that state's consent, the remedy is repatriation of the abducted individual.

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[3]Arguments relating to the United States government's breach of the 1980 Extradition Treaty between the United States and Mexico and the correct remedy for that breach are amply addressed in the brief of Respondent and those of other *amici*. For that reason Americas Watch does not raise those issues in this brief.

ARGUMENT

I.

The Abduction Of Respondent From Mexico By United States Government Agents Violated International Law And Interfered With Mexico's Ability To Fulfill Its International Law Duty To Protect The Rights Of Its Citizens.

This case strikes at the heart of a state's sovereign duty to protect the individual rights of its citizens and those located within its territory.[4] Under international law, as embodied in numerous multilateral treaties to which Mexico is a party, each state has a duty to ensure that its criminal laws are enforced fairly, with full respect for due process, and in a manner that avoids possible violation of the right to physical integrity through such practices as kidnapping or physical or psychological abuse.[5] In recognition that this duty lies in the first instance with the state where the criminal suspect is found, international law prohibits any exercise of law enforcement by one state in the territory of another without the latter state's

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[4]*See* Restatement (Third) Foreign Relations Law of the United States ("Restatement (Third)") § 701; J. Sweeney, C. Oliver & N. Leech, *Cases and Materials on the International Legal System* 488 (1988).

[5]Universal Declaration of Human Rights, U.N. Doc. A/801 (1948); American Convention on Human Rights, Dept. of State Bull. 28 (July 4, 1977), adopted by the OAS on 22 November 1969 (entered into force 1 June 1977); International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI) of 16 December 1966 (entered into force 23 March 1976). Mexico has ratified the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

consent.[6] When agents from one state invade the territory of another to abduct a citizen of that state without the latter's express or implied consent, they interfere with the state's ability to protect the rights of its citizens.

One way states preserve their ability to protect the rights of those on their territories who are facing prosecution is by entering into extradition treaties. Bilateral extradition treaties inure to the benefit of individuals within the signatory nations' territory because, through the formal diplomatic process of requesting extradition and considering another state's extradition request, they provide a framework for a state to ensure that a person's rights are protected even when that person faces prosecution by a foreign sovereign.[7]

The facts in this case illustrate what happens when the formal extradition process is circumvented. Here a Mexican national was sought by United States authorities in

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[6]In general, international law prohibits states from performing acts of sovereignty on the territory of another state. 1 Oppenheim, *International Law 295* (8th ed. H. Lauterpacht 1955). "It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigations in that state only with that state's consent." Restatement (Third), § 432(2) (1987). *See also* 1 McNair, *International Law Opinions* 76-77 (1956).

[7]It is for this reason that states do not conclude extradition treaties with states in whose criminal justice system they lack confidence. Restatement (Third), at 558. For example, the United States has no extradition treaty with Libya, Syria, Lebanon, Jordan, Yeman, Tunisia, Algeria, North Korea, the Peoples Republic of China, Vietnam, Afghanistan, Cambodia, Kuwait, Morocco, Ethiopia, Somalia, Sudan, and Mozambique.

connection with the torture and murder of a United States government agent on Mexican soil. Instead of invoking the extradition treaty, United States agents took the law into their own hands and abducted the wanted man. In transporting him to the United States they committed serious abuses — physical and psychological mistreatment and kidnapping — of the sort Mexico has a duty to prevent.

Mexico justifiably protested this assault on its duty to ensure both that crimes within its territory are prosecuted and that the manner of prosecution respected Alvarez-Machain's basic rights. As a result of the acts of the United States, Mexico was rendered powerless to protect one of its citizens from being held incommunicado, and physically and psychologically abused, let alone to ensure that his arrest was warranted and that his prosecution for the crimes of which he is accused should best proceed in the United States as opposed to Mexico. Indeed, although the United States made clear its intent to track down and prosecute all those connected with the torture and murder of Camarena, the crimes occurred on Mexican soil. Mexico had previously prosecuted and convicted more than two dozen persons for the crimes against Camarena.[8]

Had the extradition treaty been invoked, the Mexican government would have been in a position to exercise its sovereign prerogative to determine how best to ensure that Alvarez-Machain's due process rights were respected, while prosecution proceeded. It would also have been able to prevent Alvarez-Machain's mistreatment and kidnapping. Instead, incensed by the fact that individuals in Mexico had tortured and murdered a

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[8]Weinstein, Henry & Wilkinson, Tracy, "Jurors Return Camarena Conviction," *Los Angeles Times*, Aug. 7, 1990.

United States law enforcement agent acting in his official capacity, the United States government adopted a no-holds-barred approach to obtaining physical custody of those it believed to be responsible. The steps taken to kidnap Respondent show the measures it considered acceptable to achieve that goal.

The extradition treaty in effect between the two countries provided the United States with an alternative to kidnapping Alvarez-Machain and transporting him to the United States: Under Article 9 of the treaty, if Mexico refuses to extradite one of its nationals whose extradition is requested by the United States, it *must* prosecute that person in Mexico. The United States has never asserted that had it requested Alvarez-Machain's extradition and Mexico had chosen to prosecute rather than extradite him, he would not have received a fair trial or, if convicted, just punishment in Mexico. Under these circumstances, no valid United States interest justified its assault on Mexico's system of justice.

During the more than 125 years from the time the United States and Mexico signed their first bilateral extradition treaty until the abductions in connection with the Camarena case, neither government said or did anything to indicate that it had the legal right in international law to forcibly abduct a national from the territory of the other. Until now, both countries have enjoyed the assurance that because of the treaty and basic principles of customary international law, there would be no such encroachments on their sovereign territory. Indeed, were Mexico to exercise its "right" to abduct a United States citizen, little imagination would be required to envision how the government would respond. To sanction what the United States government did in this case would be to leave United States citizens without protection from their

government — other than *post facto* diplomatic efforts — should they be abducted by a foreign agent for alleged crimes committed in the United States that give another state jurisdiction over the abducted person.

II.

The Recognized International Law Remedy For The United States' Abduction Of Alvarez-Machain Is To Return Him To Mexico.

A. The works of jurists, the practice of nations, and judicial decisions enforcing customary international law support the position that repatriation is the required remedy.

Under international law,[9] "a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury." Restatement (Third) § 901. The Permanent Court of International Justice established the basic principles governing reparation:

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[9]The sources of international law are found "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). *See also* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055 (1945), T.S. No. 993. The general practice of states "should be recognized as prima facie evidence" of a rule of international law. *North Sea Continental Shelf Cases*, 1969 I.C.J. 4 (1969); Restatement (Third) § 102 ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation"). The "general assent of civilized nations," therefore, can ripen into "a settled rule of international law." *The Paquete Habana*, 175 U.S. 677, 694 (1900).

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.

Chorzow Factory (Indemnity) Case (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47.

Restitution in kind is designed to re-establish the circumstances that would have existed had the wrongful act not taken place: termination of the violation and return of the property or person wrongfully seized. The Comment to Restatement (Third) § 901 emphasizes that the purpose of the remedy of reparation is to restore "the *status quo ante*."

Likewise, the proper international law remedy for Respondent's illegal abduction is his return to Mexico.

> If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state does not demand his return,

> under the prevailing view the abducting state may proceed to prosecute him under its laws.

Restatement (Third), § 432, comment c.

Foreign courts have held that when an individual is abducted by agents of one state from the territory of another state without the latter state's consent, there is no jurisdiction and the abducted person must be set free. In *In Re Jolis*, [1933-34] Ann. Dig. 191 (Tribunal Correctionnel d'Avesnes 1933), a Belgian subject was kidnapped by French officials in Belgium and forcibly taken to France for trial. An extradition treaty between the two countries was in effect at the time of the abduction. "[T]he Belgian Government lodged an official protest with the French Government . . . claiming *the return of* Jolis, who had been irregularly arrested on Belgian territory by foreign officers." *Id.* (emphasis added). The French court ordered the defendant's immediate release:

> The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof. The information leading to the proceedings of arrest . . . the proceedings themselves, the commitment to prison . . . and all that followed thereon must accordingly be annulled.

Id.

The same result was ordered in the *Colunje Claim*, [1933-34] Ann. Dig. 250 (United States-Panama Claims Commission 1934). In that case, a warrant was issued by the District Court of the Panama Canal Zone for the arrest of the defendant on the charge of using the postal service for fraudulent purposes. A Canal Zone policeman tricked the defendant into entering the Canal Zone from

Panamanian territory and there arrested him. The government of Panama protested the illegality of the arrest. As a result, the District Court of the Canal Zone "entered a *nolle prosequi* in the proceedings against Colunje, *who was forthwith released.*" *Id.* at 250 (emphasis added). The court held:

> It is evident that the police agent of the Zone by inducing Colunje by false pretenses to come with him to the Zone with the intent of arresting him there unduly exercised authority within the jurisdiction of the Republic of Panama to the prejudice of a Panamanian Citizen, who, as a result thereof, suffered the humiliation incident to a criminal proceeding.

Id. at 250-51. The court was thus without jurisdiction to prosecute the defendant.

The cases of *Jolis* and *Colunje* are significant because they contain both of the elements, also present in this case, that trigger the international law remedy of repatriation. First, the nation on whose territory the abduction was committed did not consent to or participate in the abduction so that it had no opportunity to exercise its sovereign duty to ensure that individual rights were protected as the prosecution proceeded. Second, the abduction was effected by an individual clothed with the authority of the state attempting to assert jurisdiction over the accused, thus making it appropriate to order the state to comply with the international law remedy and restore the *status quo ante*. Those two elements distinguish either non-state abductions (in which the receiving state has committed no wrong and thus cannot fairly be ordered to make restitution) or abductions with the consent of the state from whose territory the abduction

occurred (because the state is able to ensure its sovereign duty to protect individual rights).[10]

The cases of *Jolis* and *Colunje* are consistent with this Court's opinion in *Ker v. Illinois*, 119 U.S. 435 (1886). In *Ker*, there was no violation of Peru's territorial sovereignty because the abduction in *Ker* was "without any pretense of authority under the treaty or from the government of the United States." *Id.* at 443. Since the abductor had no authority from the United States government to kidnap or forcibly remove the individual from Peru, the abduction was a private act of the abductor, not a sovereign act of the United States in Peruvian territory. Consequently, there was no violation of international law. *Ker*, therefore, did not address the issue that this case presents, because in *Ker* the authority of the United States to abduct the defendant was not at issue.

B. The cases cited by the government in its opening brief support amicus' position that repatriation is the required remedy.

The government cites a string of cases in its attempt to establish that its kidnapping of Alvarez-Machain was not

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[10]Certain courts have gone beyond the rule of *Jolis* and *Colunje* and ordered the release of the defendant even though there was participation, and thus consent, by local authorities in the abduction. In the *Case of Nollet*, 18 Journal Du Droit International Prive 1188 (Court of Appeal of Dorial 1891), French authorities arrested a fugitive in Belgian territory. The fugitive was handed over to Belgian police who brought him to the French border and returned him to French authorities, apparently thinking he was a French citizen, when in fact he was a Belgian. The French court held that the defendant would not have been before the court if French authorities had not violated the Belgian border. The court ordered the defendant released.

forbidden under international law.[11] Those cases are in fact entirely consistent with the proposition that when the offended nation does not participate in or consent to another nation's abduction of an individual from the first nation's territory, the practice of states is to find the abduction invalid and require the offending nation to return the individual.[12] Thus, the cases cited by the government that uphold jurisdiction over a defendant who claimed to have been illegally abducted from another state are fundamentally different from this case.

In the case of *In Re Argoud*, 45 I.L.R. 90 (Court of Cassation 1964), the defendant argued that he was illegally detained in France because he had been the victim of a "criminal kidnapping in Munich, the city in which he was residing, and then transported by force to France, without the institution of any extradition proceedings against him." *Id.* at 92. At the time of the abduction an extradition treaty between Germany and France was in existence, but the rendition was not pursuant to the provisions of the treaty. The defendant demanded that he

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[11]The government cites the following cases to support the argument that a state can exercise jurisdiction over an individual illegally seized from another nation's territory: *Afouneh v. Attorney-General*, 4 Ann. Dig. 328 (Palestine S. Ct. 1942); *Attorney General v. Eichmann*, 36 I.L.R. 277 (S. Ct. Israel 1962); *Ex Parte Elliott*, 1 All E.R. 373 (K.B. 1949); *In Re Karoly*, 4 Ann. Dig. 345 (Hungarian Minister of Justice 1928); *In Re Argoud*, 45 I.L.R. 90 (Court of Cassation 1964); *R. v. Lopez and Sattler*, 1 Dearsly & Bell's Crown Cases 525 (1858); *Ex Parte Scott*, 9 B. & C. 446 (1829); *The Casablanca Case* (May 22, 1900), *reprinted in* Hague Ct. Rep. 110 (Scott ed. 1916); and *The Savarkar Case* (Feb. 24, 1911), *reprinted in* Hague Ct. Rep. 275 (Scott ed. 1916).

[12]*See* 4 J. Moore, *A Digest of International Law* § 603, at 329 (1906); Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l L. 502 (1935).

be released and taken back to Germany. The court held that the defendant was not entitled to the remedy of repatriation.

In Re Argoud is distinguishable from this case because the report contains no indication that France, or any other nation, sponsored or authorized the abduction. According to the defendant, he had been abducted by "some unidentified persons." *Id.* The French police were alerted to his presence in France "by an anonymous phone call." *Id.* In addition, there was no evidence presented at the defendant's trial that the German government protested the abduction or demanded his return.

The same can be said for the case of *Ex Parte Elliott*, 1 All E.R. 373 (K.B. 1949). The defendant in that case was a deserter from the Royal Army Service Corps. He had evaded arrest for several years before he was arrested in Belgium by British and Belgian police officers and brought back to England to stand trial. The Belgian government did not protest the abduction. Indeed, Belgian police officers participated in the arrest.

Similar facts are found in the case *In Re Karoly*, 4 Ann. Dig. 345. In that case, the accused left Budapest for Egypt. The Hungarian government lodged a request for extradition with the Egyptian government, but before formal extradition procedures had begun, "the Egyptian police, acting at the request of the Hungarian consul, brought the accused from Alexandria to Trieste."[13]

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[13] *See also Delivery Without Extradition (Germany) Case*, [1919-22] Ann. Dig. 262 (Germany, Reichsgericht 1922) (fugitive in Dutch territory brought by Dutch authorities over the frontier and handed over to German authorities); *The King v. Corrigan*, [1931-32] Ann. Dig. 319 (Court of Criminal Appeal 1930) (fugitive brought from Paris by French police handed over to English police and brought to England for trial); *Katz v. Officer Commanding the Polish Military*

Unlike this case, in both *Ex Parte Elliott* and *In Re Karoly*, the abducting state was attempting to bring one of its own nationals back for trial. Further, the authorities of the state where the person being sought was located participated in the arrest, thus implicitly consenting to it. Additionally, in neither case did the state of refuge protest the arrest and removal of the individual from its jurisdiction.

The decision in *The Savarkar Case* (Feb. 24, 1911), *reprinted in* Hague Ct. Rep. 275 (Scott ed. 1916), also depended crucially on the fact that the state where the person being sought was located knowingly participated in the arrest. In *Savarkar*, a prisoner was being transported to India to stand trial. While in France, he escaped, was recaptured by French authorities and was handed over to British authorities. Subsequently, the French government demanded that the prisoner be returned to France. The Permanent Court of Arbitration held that no legal ground existed for the return of the prisoner because French authorities had participated in the initial seizure of the individual from French territory. Since France had implicitly consented to the abduction by its participation, there was no violation of France's territorial sovereignty and the remedy of repatriation was not appropriate.

In *Afouneh v. Attorney-General*, 4 Ann. Dig. 328 (Palestine S. Ct. 1942), the state in which the accused was located expressly consented to the abduction. The accused, a Palestinian, was wanted for murder in Palestine. British police arrested him in Syria and brought him

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Prison, Jerusalem, [1943-45] Ann. Dig. 165 (Palestine, Supreme Court, sitting as a High Court of Justice 1944) (defendant arrested by the Civil Police of the Palestine Government in Palestine and handed over to the Military Police of the Polish Army).

within Palestinian jurisdiction. An extradition treaty between the two territories was in place, but the arrest was effectuated before the extradition request could be processed. Syria did not protest the abduction. Subsequent to the seizure, Syria returned the extradition papers with respect to the accused thereby giving its express consent to Palestinian jurisdiction over him. *Id.* at 327. Since the government from whose territory the accused was abducted consented to the abduction, the court had jurisdiction to prosecute.

Ex Parte Scott, 9 B. & C. 446 (1829), a case that superficially resembles that before this Court, is also distinguishable. In *Scott*, the fugitive was arrested in Belgian territory by a British police officer and brought against her will to England where she was tried. She argued that the English court lacked jurisdiction to try her because of the improper manner in which she had been brought into the jurisdiction. The court disagreed, holding that it would not look into the circumstances of her arrest.

The court's opinion is silent as to whether the Belgian government participated in, consented to or protested the abduction.[14] Moreover, "[n]owhere in the judgment is the question considered of the effect of a breach of international as distinct from municipal law upon the jurisdiction of the court."[15] The court in *Ex Parte Scott* simply did not address the issue of its jurisdiction in terms of international law.

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[14]*See* O'Higgins, *Unlawful Seizure and Irregular Extradition*, 1960 Brit. Y.B. Int'l L. 279, 282; Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 1952 Brit. Y.B. Int'l L. 265, 273.

[15]O'Higgins, 1960 Brit. Y.B. Int'l L. at 282.

The two cases of *R. v. Lopez and Sattler*, 1 Dearsly & Bell's Crown Cases 525, also provide no support for the government's argument. The issue in those cases was whether English courts had jurisdiction over individuals who committed crimes aboard an English ship on the high seas. In both cases, the court found jurisdiction based upon the rule that an English ship is "part of the territory of England." *Id.* at 547. Since the individuals were entitled to "protection of the English law" while aboard the ship, they "owed obedience to that law."[16] *Id.*

In *Attorney General v. Eichmann*, 36 I.L.R. 18 (Dist. Ct. Israel 1961) *aff'd* 36 I.L.R. 277 (Sup. Ct. Israel 1962), Israeli agents abducted Eichmann from Argentina. Argentina initially protested the abduction. But before Eichmann was brought before the Israeli court, Argentina withdrew its protest. Consequently, when Eichmann objected to the Israeli court's jurisdiction on the grounds that his abduction by Israeli agents violated Argentine sovereignty, the court held that jurisdiction was not barred because Argentina had withdrawn its protest. *Id.* at 70-71. As the Ninth Circuit stated in *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1361-62 n.23 (9th Cir. 1991), "the exercise of jurisdiction over Eichmann was proper because at the time the court conducted its proceedings there was no longer any outstanding protest of any kind by the Argentine government. Although Argen-

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[16]In the *Sattler* case, the accused was arrested by the London police in Germany "with the assistance of the Hamburgh police" and brought against his will on board the English ship in order that he might be tried in London for the crime of larceny. On board the ship he committed murder, the crime for which he was convicted. The issue was whether the court had jurisdiction to try the defendant for murder, not for larceny. Thus, even though German authorities assisted in the arrest, which supports Respondent's argument, the case is inapposite to the issues presented in this case.

tina originally demanded Eichmann's return, it subsequently withdrew the entire protest. Israel and Argentina issued a joint communique stating that they had decided to regard the entire incident closed."

Foreign cases, as shown above, do not support the position that a court has jurisdiction over an individual who has been abducted from another state, when that state protests the abduction. On the contrary, they lend support to the proposition that the appropriate remedy for abductions in the circumstances such as those presented in this case is to return the accused to the country from which he was abducted.

CONCLUSION

Because the United States government abducted Respondent Dr. Humberto Alvarez-Machain without Mexico's consent and because it precluded Mexico from exercising its sovereign duty to protect the rights of its people, as well as its treaty-based right to determine whether to extradite or try one of its nationals, United States courts lack jurisdiction over Alvarez-Machain. Therefore, he must be returned to Mexico.

DATED: March 4, 1991

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No. 91-712

Supreme Court, U.S.
FILED
MAR 4 1992
OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether lower executive officials may reinterpret a bilateral extradition treaty to add a new term authorizing forcible, unconsented governmental kidnapping, without legislative approval and over the treaty partner's repeated protests.

2. Whether this Court should sanction an executive reinterpretation of an extradition treaty that nullifies the treaty by violating the very norms of international law that gave it rise.

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1991

No. 91-712

UNITED STATES OF AMERICA,
Petitioner,
v.
HUMBERTO ALVAREZ-MACHAIN
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The Allard K. Lowenstein International Human Rights Clinic of the Yale Law School and the Center for Constitutional Rights

hereby submit the attached brief Amicus Curiae supporting affirmance of the Ninth Circuit's decision in this case.*

The Allard K. Lowenstein International Human Rights Clinic of the Yale Law School [Human Rights Clinic] was organized in 1991 at the Yale Law School as a faculty-supervised course under the auspices of the Allard K. Lowenstein International Human Rights Project, a ten-year old student-run organization that seeks to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights.

The Human Rights Clinic has important interests in this case because it is currently acting as co-counsel for the plaintiffs in several ongoing lawsuits involving the interpretation of important international human rights treaties. See, e.g., Evans Paul, et al. v. Prosper Avril, No. 91-0399 (S.D. Fla. filed Feb. 28, 1991) (suit seeking damages for torture, arbitrary detention, cruel, inhuman or degrading treatment against former dictator of Haiti); Teresa Xuncax,

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*Amici Curiae file this brief with the consent of both parties in support of the position advanced by respondent. Letters of consent have been filed with the Clerk of this Court.

et al. v. Hector Gramajo, No. 91-11564WD (D. Mass filed June 6, 1991) (suit seeking damages for summary execution, disappearance, torture, arbitrary detention, and cruel, inhuman or degrading treatment against former defense minister of Guatemala). The important questions of treaty reinterpretation presented in this case may bear upon the issues in those lawsuits. The Court's disposition in this case is therefore of great interest to the Human Rights Clinic and its clients.

The Center for Constitutional Rights [CCR or Center] is a tax-exempt litigation organization devoted to enforcing the U.S. Bill of Rights and the International Bill of Rights. The Center has a particular interest in enforcing the norms of international human rights in United States courts. CCR was the lead counsel in the landmark case, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Claims Act, 28 U.S.C. §1350 (1988), grants federal courts jurisdiction to hear cases seeking compensation for acts of torture that occured outside the United States. Since the Filartiga decision, the Center has been co-counsel

in numerous cases brought pursuant to the Alien Tort Claims Act involving interpretation of international human rights treaties, including the cases currently being brought by amicus Human Rights Clinic. The Court's decision in this case is thus of great importance to the Center and its clients.

SUMMARY OF ARGUMENT

In a brief not joined by the State Department Legal Adviser's office, the Justice Department accuses the Ninth Circuit of unlawfully reinterpreting the bilateral U.S.-Mexico extradition treaty, thereby "rewrit[ing] the international agreements to which this Nation is party." Justice Department Brief ("JD Br.") at 24. In fact, it is the Justice Department that has engaged in unlawful treaty reinterpretation, abruptly reading into a well-understood extradition treaty a new term authorizing forcible, unconsented governmental kidnapping.

The United States and Mexico entered their bilateral extradition treaty in 1980 to promote mutual cooperation in law enforcement. By entering into the treaty, the parties sought to

avoid future disputes, to protect territorial sovereignty, and to safeguard individual rights by creating an exclusive means for surrendering a suspect from one country to the other in all cases not involving consensual rendition. To that end, Article 9 of the treaty created only two options when one state formally seeks surrender of a national of the other: extradition or domestic prosecution.

In this case, low-level Drug Enforcement Administration (DEA) agents pursued an illegal third option: they forcibly kidnapped respondent Dr. Alvarez from Mexican territory without Mexican governmental consent, in bald violation of the treaty. When Mexico repeatedly demanded respondent's return, Justice Department lawyers sought to justify the DEA's action after the fact by reinterpreting Article 9, reading it to include a new term that would permit forcible, unconsented governmental abductions. Having twice failed below to win judicial endorsement of their novel rewriting, the Department's lawyers now ask this Court to

revise the treaty to permit the very kidnapping option that both parties negotiated the treaty to preclude.

The Department's reinterpretation does violence to the structure, plain language, negotiating and ratification histories, and object and purpose of the treaty. Notwithstanding the Constitution's treatymaking procedures and principle of separation of powers, the Department seeks to effect its reinterpretation--a de facto treaty amendment--without presenting that amendment to the Senate for either consultation or consent. Furthermore, the Department seeks to amend the treaty over repeated and vociferous objections by our treaty partner. Should this Court bless petitioner's revision of this treaty, potentially all of the extradition treaties to which the United States is currently party could be similarly reconstrued to permit forcible governmental abductions in the treaty partner's territory despite its explicit protest. Any of our treaty partners could invoke such a reinterpretation to justify forcible abduction of U.S. nationals from U.S. soil, even over our government's repeated and vehement objections.

This Court should not sanction an executive reinterpretation of an extradition treaty that would violate the very norms of international law that form its object and purpose. At least since United States v. Rauscher, 119 U.S. 407, 429 (1886), this Court has recognized that extradition treaties must be construed not in isolation, but in light of the norms of customary and conventional international law that gave rise to the treaty. Forcible, unconsented, state-sponsored abductions violate settled rules of both customary and conventional international law and disrupt intergovernmental cooperation. The United States and Mexico negotiated this treaty not simply to expedite prosecutions, but to promote mutual cooperation, to protect each state's territorial sovereignty from forcible intrusions, and to protect individual suspects from arbitrary arrests and detentions. Not content to read "shall" as "may," or to rewrite Article 9, the Justice Department now urges a treaty construction that so violates the parties' intent as to effectively nullify the treaty altogether. By standing the treaty on

its head, petitioner has provoked precisely the kind of international dispute that the extradition treaty was designed to prevent.

No serious dispute exists regarding respondent's "standing" to raise the treaty violation. The Supremacy Clause, the treaty, and applicable rules of international law all bar the executive from trying Mexican nationals who have been abducted to the United States in violation of the treaty, in cases where Mexico has unambiguously demanded their return. No United States court has ever tried a kidnapped foreign national under circumstances such as these. Nor has this Court ever authorized lower executive officials to nullify a duly ratified treaty without the advice and consent of the Senate, over the repeated protests of our treaty partner, and in flagrant violation of established norms of international law that formed the treaty's object and purpose. This Court should reject petitioner's invitation to condone such lawless conduct.[1]

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[1]Given the extreme set of facts presented here, this Court may affirm the Ninth Circuit's judgment without deciding whether the President himself could reinterpret a ratified treaty without the advice and consent of the Senate, or whether the President could reinterpret the extradition treaty with Mexican approval or acquiescence, in a manner fully consistent with the treaty's broad object and purpose and norms of international law.

ARGUMENT

I. LOWER EXECUTIVE OFFICIALS MAY NOT REINTERPRET A MANDATORY BILATERAL EXTRADITION TREATY TO ADD A NEW TERM PERMITTING FORCIBLE, UNCONSENTED GOVERNMENTAL KIDNAPPING.

Mexico and the United States have cooperated in law enforcement since 1862, concluding three extradition treaties and several mutual assistance agreements in criminal matters.[2] Against this long history of mutual cooperation, the U.S. and Mexico negotiated the current treaty, which entered into force on January

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[2]Extradition treaties between the U.S. and Mexico have been in force since 1862. See Treaty of Extradition, May 4, 1978, United States of America-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (entered into force January 25, 1980); Treaty for the Extradition of Criminals, the United States of America-United Mexican States, 12 Stat. 1199, Treaty Series No. 209 (entered into force May 20, 1862; terminated January 24, 1899); Treaty of Extradition, United States of America-United States of Mexico, 31 Stat. 1818, Treaty Series No. 242 (entered into force April 22, 1899; terminated 1980); Supplementary Convention, Treaty Series No. 421 (entered into force April 13, 1903); Supplementary Convention, 44 Stat. 2409, Treaty Series No. 741 (entered into force July 11, 1926); Supplementary Extradition Convention United States of America-United Mexican States, 55 Stat. 1133, Treaty Series No. 967 (entered into force April 14, 1941).

The U.S. and Mexico have also concluded a Treaty of Cooperation for Mutual Legal Assistance, United States of America-United Mexican States, 27 I.L.M. 443 (1988) (entered into force May 8, 1991); and an Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, United States of America-United Mexican States, 29 I.L.M. 58 (1990) (entered into force July 30, 1990).

25, 1980. See Treaty of Extradition, May 4, 1978, United States of America-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (hereinafter "Extradition Treaty"), reprinted in Joint Appendix ("J.A.") at 72. The treaty's object and purpose, stated explicitly in its Preamble, was "to cooperate more closely in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition." Id. (emphasis added).

To further this object, the Parties added several provisions not covered in any of their previous extradition treaties, carefully designed to accommodate each other's sovereignty concerns. To ensure mutual certainty regarding the availability of extradition, the parties carefully specified a list of extraditable crimes (appendix), expressly excluded offenses of a political and military character (art. 5), and permitted extradition for offenses committed outside the territory of the requesting state where the person is a national of the requesting state (art. 1). To address cases such as this, where one state seeks surrender of a national of the other, the parties adopted a new Article 9, an "extradite-or-prosecute" provision.

Because Mexican law bars the extradition of Mexican nationals except in extraordinary circumstances, the parties acknowledged that the requested state would not "be bound to deliver up its own nationals." Id. art. 9(1).[3] Instead, the requested state would "have the power to deliver them up if, in its discretion, it be deemed proper to do so." Id. (emphasis added). "If extradition is not granted" pursuant to this provision, the parties specified, "the requested Party shall submit the case to its competent authorities for the purpose of prosecution . . . ." Id. art. 2. (emphasis added).

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[3]See Ley de Extradicion Internacional, Capitulo I, Articulo 14, published in Diario Oficial (Dec. 29, 1975) (no Mexican national may be extradited to a foreign country except in exceptional cases in the discretion of the Executive); Communication from Secretaria de Relaciones Exteriores Consulada General to the Honorable Justices of the Ninth Circuit Court of Appeals, J.A. at 68-69:

> Mexican legislation in force and effect makes it illegal for Mexican Government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement or agreement, either with the United States or with any other country, to surrender its own national.
>
> In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably and expressly reserved to the parties the right to refuse requested extradition to one of their own respective nationals, agreeing instead to prosecute them in their own national courts in the interest of justice.

(Emphasis added).

Petitioner would have this Court believe that the United States and Mexico painstakingly negotiated this comprehensive structure of mutual cooperation in criminal matters as an "optional protocol": a wholly optional mechanism, open to circumvention by either party at any time, even over the other party's express objection. Petitioner further claims that forcible government-sponsored kidnapping of an individual from the sovereign territory of the other, over that party's explicit protests, fully accords with the treaty's object and purpose. The treaty's plain language, structure, and negotiating and ratification histories all confirm the District Court's opinion, affirmed by the Ninth Circuit, that petitioner's reinterpretation "is absurd." 745 F. Supp. 599, 610 (C.D. Cal. 1990).

A. The Plain Language of the U.S.-Mexico Treaty Establishes Mandatory Prosecute-or-Extradite Procedures That Are Exclusive in All Cases Not Involving Consensual Rendition.

The treaty's plain language demonstrates the parties' intent to provide mandatory procedures governing the extradition of persons in all cases not involving consensual rendition.[4] Articles 1 and 2 create a duty to extradite for both territorial and extraterritorial offenses and direct that "[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of [the extraditable offenses listed in] the clauses of the Appendix..." Id. art. 2 (emphasis added). Virtually all remaining articles employ the mandatory term "shall" to differentiate those circumstances

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[4]"Consensual rendition" refers to the informal, voluntary surrender of a person by one state to another without extradition procedures. Rendition may involve cooperation between law enforcement agencies or use of immigration laws directly or indirectly to accomplish a surrender. See M. Cherif Bassiouni, International Extradition and the World Public Order 121-124 (1974).

where extradition is required from those where each signatory retains discretion to refuse to extradite an alleged criminal.[5]

Petitioner claims that it can simply ignore these mandatory provisions by unilaterally abducting the individual sought, rather than pursuing the carefully specified extradition procedure. Yet such a reading would twist the clear import of the treaty by reconstruing the mandatory words "shall" in these treaty provisions

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[5]"Extradition shall not be granted when the offense for which it is requested is political or of a political character" (art. 5), when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party (art. 6), or "when the prosecution or the enforcement of the penalty for the offense...has become barred by lapse of time according to the laws of the requesting or requested state (art. 7)." The remaining articles similarly use mandatory language with regard to: requests (art. 10), additional evidence (art. 12), procedure (art. 13), decision and surrender (art. 14), third-party requests (art. 16), the rule of specialty (art. 17), surrender of property (art. 19), transit (art. 20), expenses (art. 21), scope (art. 22), and ratification and denunciation (art. 23).

Only a few provisions are worded in nonmandatory terms. Articles 8 and 9 of the treaty refer to circumstances where the obligation to extradite is subject to the discretion of the requested party. Article 8 provides, "When the offense...is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused...." Article 9 provides that the requested party may deliver up its own nationals "if, in its discretion, it be deemed proper to do so," but "[i]f extradition is not granted, the requested party shall submit the case to its competent authorities for purposes of prosecution ....." (emphasis added). Similarly, the provisions regarding the extraordinary provisional arrest (art. 11), delayed surrender (art. 15), and summary extradition (art. 18) are explicitly discretionary.

to mean "may." More fundamentally, petitioner's claim that these provisions are not exclusive, but permit forcible governmental kidnapping, would render many of these treaty provisions meaningless. For example, the provisions requiring "sufficient" evidence to grant extradition (art. 3), withholding extradition for political or military offenses (art. 5), withholding extradition when the person sought has already been tried (art. 6), witholding extradition when the statute of limitations for the crime has lapsed (art. 7), and granting the requested state discretion to refuse to extradite an individual who would face the death penalty in the requesting country (art. 8) would all serve no purpose if the requesting state could simply ignore those restraints and kidnap the sought-after individual.[6]

The extradition treaty is the exclusive means of surrendering a suspect in cases where there is possibility for disagreement between the contracting states. That the signatories may mutually

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[6] As the Ninth Circuit recognized in Verdugo, "[e]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." 939 F.2d at 1349.

agree to consensual informal rendition outside the provisions of the treaty in no way authorizes forcible, state-sponsored abductions without mutual consent. In this case, the Mexican government publicly objected four times to the unilateral abduction by U.S. agents of a Mexican national from Mexico. See Brief of Respondent ("Resp. Br.") at 3-4. Those protests made any rendition nonconsensual and remitted the parties to their two treaty-based remedies: either Mexican prosecution (art. 9(2)) or formal extradition in accordance with the treaty's mandatory terms.

B. To Avoid the Treaty's Mandatory Language, the Justice Department Has Written a New Implied Term into Article 9, Authorizing Forcible, Unconsented Governmental Kidnapping.

The District Court found that lower-level Drug Enforcement Administration (DEA) agents pursued a third, illegal option: they forcibly kidnapped respondent Dr. Alvarez from Mexican territory without Mexican governmental consent, in bald violation of the treaty. See Appendix to Petition ("Pet. App.") at 4a, 24a-25a. After Mexico repeatedly demanded respondent's

return, Justice Department lawyers sought to justify the DEA's action after the fact by claiming that the extradition treaty permits unilateral abductions. By so arguing, the Department seeks, in effect, to amend Article 9 of the treaty, which governs permissible modes of surrendering nationals of the requested country.

When one country seeks surrender of a national of the other, Article 9 requires the requested party either to extradite the individual, or if extradition is not granted, "the requested Party shall submit the case to its competent authorities for the purpose of prosecution" (emphasis added). Had the Justice Department complied with the treaty and filed an extradition request under Article 9, Mexico would have been obliged either to extradite Dr. Alvarez to the United States or to submit his case to competent domestic authorities for prosecution.[7] Mexican prosecutors and courts are fully competent to prosecute and try Dr. Alvarez for the

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[7]The latter course would have been more likely. Because, as petitioner concedes, Mexican law prohibits the extradition of nationals except in exceptional circumstances, "[t]o date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States." JD Br. at 21, n.17.

territorial offenses with which he was charged. See Brief for the United Mexican States as Amicus Curiae in support of Granting Review ("Mexican Amicus Brief") at 6. By abducting Dr. Alvarez from Mexico without its consent, lower executive officials in this country denied Mexico its opportunity to exercise either of its treaty options.

Petitioner charges that the District Court found "an implied extradition-treaty obligation [thereby ignoring] the cardinal rule that the courts are not free to rewrite the international agreements to which this Nation is a party." JD Br. at 24-5. Yet ironically, it is petitioner, and not the courts below, that seeks to rewrite the treaty. Under petitioner's reinterpretation, Article 9 would contain a new term, providing:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the

purpose of prosecution, provided that Party has jurisdiction over the offense.

3. Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other Contracting Party, abduct nationals from the territory of one Party for prosecution in the territory of the other.

Having twice failed below to win judicial endorsement of this novel rewriting, petitioner now asks this Court to revamp Article 9 into "a license or charter for signatory nations to engage in unlawful conduct in all those categories of cases in which the treaty prohibits extradition." Verdugo, 939 F.2d at 1351. Yet as petitioner himself strenuously argues, such judicial amendments are constitutionally forbidden.[8]

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[8]See JD Br. at 24 (citing The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) ("to alter, amend, or to add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions") and Maximov v. United States, 373 U.S. 49, 54 (1963) ("it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty...when ...there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of the signatories.")); see also JD Br. at 24 (citing Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134-35 (1989); United States v. Stuart, 489 U.S. 353, 371-73 (1989) (Scalia, J., concurring in the judgment)); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 283 (1984) (Stevens, J., dissenting) ("The task of revising an international treaty is not

C. The Negotiating and Ratification Histories of the Treaty Confirm that Petitioner's New Implied Term Violates the Treaty.

The negotiating and ratifying histories of Article 9 and the extradition treaty as a whole fully support the plain language of that article as written.[9] That history demonstrates that neither negotiating party, nor the Senate that ratified the treaty, supported the reinterpretation that petitioner now urges on this Court.

The primary purpose of the parties in negotiating the new Treaty was to promote cooperation.[10] As drafted, Article 9

Court has any authority to perform.").

[9]See United States v. Stuart, 489 U.S. 353, 366 (1989) ("Nontextual sources . . . often assist us in 'giving effect to the intent of the Treaty parties,' such as a treaty's ratification history and its subsequent operation") (citation omitted); id. at 406 n.7 (consideration and consultation of such materials as Senate preratification debates and reports "is eminently reasonable."). This Court has regularly made reference to such materials. See, e.g., Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988); Societe Nationale Industrielle Aerospatiale v. U. S. Dist. Ct, 482 U.S. 522 (1987); Air France v. Saks, 470 U.S. 392 (1985); Immigration and Naturalization Service v. Stevic, 467 U.S. 407 (1984); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984); Warren v. United States, 340 U.S. 523 (1951).

[10]The new provisions of the Treaty would "make a significant contribution to international cooperation in law enforcement." Presidential Letter of Transmittal attached to Senate Advice and Consent at 3. See also Preamble to Extradition Treaty (the purpose of the treaty is "to cooperate more closely in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition").

served that purpose by binding each party to a prosecute-or-extradite obligation with regard to its own nationals. Precisely because the parties understood the Mexican government's reluctance to extradite its own nationals, Article 9 was drafted to provide the requested state with the alternative of prosecution. Nothing in the negotiating history suggests that the parties intended simultaneously to allow the expedient third option that petitioner now invokes: forcible, unconsented kidnapping of the treaty partner's nationals over the party's express objection.[11]

Nor does any evidence in the treaty's ratification history suggest that the Senate intended to authorize forcible unconsented abduction of nationals of either country.[12] To the contrary, such

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[11]This interpretation "is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." U.S. v. Rauscher, 119 U.S. 407, 420 (1886). To construe the treaty to permit forcible, non-consensual abductions would be inconsistent with its express purpose of facilitating and increasing cooperation in the area of law enforcement. See Preamble to the Extradition Treaty, quoted in supra note 10.

[12]Petitioner calls it "inconceivable that the President would have negotiated a treaty that overturns Ker [v. Illinois, 119 U.S. 436 (1886)] and then submitted that treaty to Congress without any mention of the issue." JD Br. at 31. Because other briefs filed with this Court fully rebut petitioner's

an understanding would have rendered debates about the treaty's restrictions entirely superfluous. The presidential message accompanying the treaty expressly recognized that:

> The new U.S.-Mexico treaty would permit the U.S. to extradite its own citizens, as does the old treaty. Mexican law, however, prohibits the extradition of Mexican nationals. The treaty thus obliges the requested state, if it does not extradite its own nationals, to submit the case to its competent authorities for a decision as to prosecution, provided that state has jurisdiction over the offense.

Presidential Message, Extradition Treaty Between the United States and Mexico--Changes in the New Treaty at 19 (emphasis added). The State Department Letter of Submittal attached to the Senate's Advice and Consent similarly reflected that the treaty "takes into account the law of Mexico prohibiting the extradition of its

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Ker-Frisbie claims, we need not address them in great detail. See, e.g., Resp. Br. at 33-45. Suffice it to say that the President did not mention Ker to Congress--a case involving private kidnapping without Peruvian government protest at a time when that government was occupied and incapable of receiving an extradition request--because no one imagined that Ker authorized governmental kidnappings in violation of a valid and ongoing extradition treaty over the repeated protests of the treaty partner. Had the Mexican government known that the executive planned to conduct forcible governmental abductions notwithstanding the treaty, presumably it would have protested, as it has consistently done since 1906. See, e.g., JD Br. at 28, n.23 (recounting the Mexican protest regarding the 1906 kidnapping of Antonio Martinez).

nationals but allowing for their prosecution in Mexico for offenses committed abroad." See State Department Letter of Submittal Attached to Senate Advice and Consent at 6.

Significantly, nothing in the ratification history suggests that the executive and Senate entered the treaty intending to allow Mexican officials to forcibly abduct United States citizens from our territory without our consent to be brought to trial in Mexico. It is inconceivable that the Senate would have endorsed this possibility without discussion, had it understood Article 9 implicitly to offer each government a kidnapping option.

In construing a treaty, a Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 399 (1985). The plain reading of the Treaty's text and structure, coupled with its negotiating and ratification histories, confirms that Article 9's prosecute-or-extradite mandate was intended to strengthen, not disrupt, cooperation between the United States and Mexico in law enforcement.

II. THIS COURT SHOULD NOT AUTHORIZE DE FACTO AMENDMENT OF A TREATY BY LOWER EXECUTIVE OFFICIALS WITHOUT CONGRESSIONAL CONSULTATION OR CONSENT, AND OVER THE REPEATED, UNEQUIVOCAL OBJECTIONS OF OUR TREATY PARTNER.

The United States-Mexico extradition treaty was consented to by the Senate and agreed to by Mexico. Having made that treaty, the executive branch "is not [now] free to treat a treaty as though it meant something entirely different from what it says. . . . The Constitution . . . give[s the] President power to 'make Treaties' only 'by and with the advice and consent of the Senate.'" Laurence H. Tribe, American Constitutional Law, §4-5, at 225 (2d ed. 1988) (citations omitted). The only extradition treaty that the President was authorized to "make" was the treaty as it was then understood by the Senate and our treaty partner.[13]

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[13]As Professor Louis Henkin has noted:

> The principle that the President can only make a treaty as it is understood by the Senate would govern even if the Senate had given no indication of its understanding of the treaty. In that event, it must be assumed . . . that the Senate understood the treaty to mean what it would be understood to mean by reasonable people, reading the text of the treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose. . . . . That interpretation,

By seizing Dr. Alvarez and others,[14] DEA officials ignored mandatory language in the U.S.-Mexico Extradition Treaty, and introduced new language into Article 9. Justice Department lawyers now invite this Court to endorse this novel reinterpretation. The courts below correctly rejected that invitation, relying upon the treaty's clear language and purposes, the intent and expectations of the Mexican Government,[15] and the understanding of the executive and the Senate upon ratifying the treaty.

To allow lower executive officials to perform such a post hoc unilateral reinterpretation of this treaty would strike at the

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> therefore, is the interpretation which the President must adopt for the United States.

The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 82 (1987) (hereinafter ABM Hearings).

[14]The kidnapping of Dr. Alvarez was not an isolated incident. See also United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), petition for cert. pending, No. 91-670 (involving seizure of Mexican national on Mexican soil by Mexican police officers, at the behest of DEA agents).

[15]The Mexican Government's intent is amply demonstrated by its continuing protests against respondent's forcible abduction. See Mexican Amicus Brief at 10.

heart of our separation of powers.[16] For such reinterpretations amount to de facto amendment of the treaty without the consultation and consent of the Senate or our treaty partner, in contravention of the treaty-making procedures detailed in Article II of the Constitution.[17] "If, following ratification, the Executive could unilaterally change the meaning of a treaty as it had been presented to the Senate, the careful consideration the Senate gives to treaty language, purposes, and effect, would stand in constant peril of nullification by reinterpretation by Executive officials, high or low." Rainbow Navigation v. Department of the Navy, 699 F. Supp. 339, 343 (D.D.C. 1988) (H. Greene, J.), rev'd on other grounds, 911 F.2d 797 (D.C. Cir. 1990).

The final authority to interpret a treaty rests not with the executive, but with the judiciary. See Japan Whaling Ass'n v.

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[16]Unilateral executive reinterpretation of a treaty constitutes "an offensive against the separation of powers and an assault on the Senate's constitutionally specified role in the treatymaking process." ABM Hearings, supra note 13, at 83 (testimony of Laurence H. Tribe).

[17]Article II provides that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." U.S. Const., art. II, § 2, cl. 2.

American Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements"); Sumitomo Shoji America v. Avagliano, 457 U.S. 176 (1982). This Court can and must bar lower executive officials from reinterpreting the treaty to make it wholly different from the treaty which the parties negotiated and to which the Senate advised and consented.

A. This Court Should Not Sanction a Treaty Amendment Effected by Lower Executive Officials Without Congressional Consultation or Consent.

This case represents a sharp break in the executive's interpretation of the U.S.-Mexico extradition treaties. Until this case, the executive consistently interpreted extradition treaties to preclude kidnapping and forced abduction. As early as 1881, Secretary of State Blaine stated that the U.S.-Mexico extradition treaty "does not authorize either party, for any case, to deviate from [its] forms or arbitrarily [to] abduct from the territory of one party a person charged with a crime, for trial within the jurisdiction of the other." See Letter from Secretary of State James Blaine to O.R.

Roberts, Governor of Texas (May 3, 1881), in Domestic Letters of the Department of State, 1784-1906. In 1887, Secretary of State Bayard confirmed that abductions constitute a clear violation of the U.S.-Mexico extradition treaty. See Letter from Secretary of State T.F. Bayard to Thomas C. Manning (February 26, 1987), in Diplomatic Instructions of the Department of State, 1801-1906. Almost a century later, the executive branch reaffirmed its opposition to transborder abductions in Secretary of State George Schultz's exchange of notes with Canada agreeing to act to deter such abductions. See United States v. Verdugo-Urquidez, 939 F.2d 1341, 1353-54 (9th Cir. 1991). In 1986, then-State Department Legal Adviser Abraham Sofaer testified that "seizure by U.S. officials of terrorist suspects abroad [might be] incompatible with the bilateral extradition treaties that we have in force with [other] nations." Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st

Sess. 63 (1985). As recently as 1989, Mr. Sofaer told Congress that "[f]orcible abductions from a foreign state clearly violate this principle" requiring respect for foreign sovereignty. Oversight Hearing on FBI Authority to Seize Suspects Abroad Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 100th Cong., 1st Sess. 6 (1989) (statement of Abraham Sofaer, State Department Legal Adviser).

The Government of Mexico has long held the same understanding of the extradition treaty. Indeed, as noted above, Mexico could not agree to the reinterpretation the executive now suggests, because Mexican law forbids its governmental authorities from entering explicit or implicit agreements to surrender their own nationals to foreign governments.[18]

"When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [this Court] must, absent extraordinarily strong

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[18]See supra note 3; JD Br. at 28, n.26 (recounting Mexican protest of U.S. abduction of Antonio Martinez in 1906).

contrary evidence, defer to that interpretation." Sumitomo Shoji America v. Avagliano, 457 U.S. 176, 185 (1982). Yet the Justice Department would now reverse the prevailing interpretation of extradition treaties to include an implied term allowing forcible abductions from a treaty partner's territory.

This Court owes no deference to the Department's newly minted reinterpretation.[19] That reinterpretation runs flatly contrary to the interpretation of the treaty presented to the Senate during the ratification process.[20] The chronology of this case

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[19]Cf. Perkins v. Elg, 307 U.S. 325 (1939) (construing bilateral naturalization treaty in accordance with the historical construction and refusing to defer to change in executive branch policy); Johnson v. Browne, 205 U.S. 309 (1907) (rejecting executive's interpretation of U.S.-U.K. extradition treaty to mean that person can be surrendered for one offense and punished for another); Rainbow Navigation v. Department of the Navy, 699 F. Supp. 339 (D.D.C. 1988), rev'd on other grounds, 911 F.2d 797 (D.C. Cir. 1990) (rejecting executive's reinterpretation of U.S.-Iceland Defense Treaty).

[20]In a similar case, Rainbow Navigation v. Department of the Navy, 699 F. Supp. 339 (D.D.C. 1988), rev'd on other grounds, 911 F.2d 797 (D.C. Cir. 1990), the district court rejected the Department of the Navy's reinterpretation of the U.S.-Iceland Defense Treaty in favor of the original interpretation of the treaty. After examining executive representations to the Senate during the advice-and-consent period, Judge Harold Greene had

> no doubt about the obligation of the Executive Branch to stand behind the representations made by its officials to the Senate committee . . . and to comply with the conditions attached, formally or informally, by the Senate as part of its

strongly suggests that DEA agents effected the seizure of Dr. Alvarez in simple disregard of the bilateral extradition treaty, and that the executive's lawyers manufactured their treaty reinterpretation to provide a post hoc justification.[21] After supporting the Justice Department below, the State Department has failed to join the Solicitor General's brief, rendering the

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> ratification. Any other rule would undermine the authority of the Senate under Article 2 section 2 of the Constitution to concur or fail to concur in treaties . . . .

Id. at 343. Judge Greene determined that the Senate had relied upon executive representations that the existing U.S. military cargo service (Rainbow) would not be disadvantaged as a result of the treaty, thus rendering subsequent disadvantageous changes introduced by the Navy into the competition procedures an unlawful reinterpretation of the treaty. On appeal, the D.C. Circuit concluded that the treaty applied to U.S.-flag service generally, not Rainbow in particular, and that the 1988 Navy rules did not, in fact, depart from the Navy's previous interpretation, but did not question the district court's analysis of the invalidity of unilateral executive reinterpretations.

[21] See Pet. App. at 6a-13a, 24a-25a. As the Ninth Circuit noted in Verdugo, 939 F.2d at 1353, the Legal Adviser's "views [in this case, discussed infra, note 22] appear to have been adopted only with an eye toward the current litgation." This Court has given little credence to a party's position where it constitutes "no more than statements of a litigating position." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 693 (1976) (quoting counsel's brief). Cf. Securities Industry Association v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 143 (1984) ("agency interpretations of a statute are to be given deference only if the interpretation is one stated by the agency and not merely by the litigating attorney in the context of a lawsuit").

executive branch's views "on the subject before us . . . unclear or ambivalent." Verdugo, 939 F.2d at 1354.[22]

Yet even assuming that the Justice Department's treaty reinterpretation now constitutes the official executive reading, the Constitution bars the executive branch from reinterpreting the treaty without the advice and consent of the Senate. As the Senate Foreign Relations Committee recently noted, "when the President acts beyond the scope of his constitutional authority to interpret a treaty, he is in effect either amending that treaty or making a new one . . . [E]ach such act requires the advice and consent of the Senate." S. Rep. No. 164, 100th Cong., 1st Sess. 42 (1987). Not

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[22]The Ninth Circuit correctly declined to defer to a letter from the State Department Legal Adviser, produced on appeal for the purpose of related litigation, on the ground that the court had no doubts regarding the treaty's unambiguous meaning and that the predecessor Secretary of State and Legal Adviser had both adhered to the prevailing treaty interpretation. Verdugo, 939 F.2d at 1353-54. In any event, this Court has never blindly deferred to State Department legal interpretations. See, e.g., W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 408-09 (1990) (refusing to adopt position urged by State Department Legal Adviser in the district court, which was found persuasive by the court of appeals); Chan v. Korean Airlines, 490 U.S. 122 (1989) (rejecting Department's interpretation of Warsaw Convention); Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1 (1986) (rejecting executive's interpretation of aviation treaty); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (six Justices reject claim of absolute judicial deference to executive branch in act of state cases).

only did lower executive officials fail to follow their constitutional duty to present this new treaty to the Senate; the Senate would not have accepted the implied term because it violates the central purposes of the extradition treaty. See Part III, infra.

B. This Court Should Not Sanction a Treaty Amendment Effected by Lower Executive Officials Over the Repeated, Unequivocal Objections of Our Treaty Partner.

The de facto amendment attempted here becomes particularly egregious in view of our treaty partner's repeated and vociferous rejection of it. One contracting party to a treaty cannot change the terms of the treaty by itself, over its partner's objections.[23] Furthermore, this Court recognized that

> [t]here is something . . . which shocks the conscience in the idea that a treaty can be put forth as

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[23]See American Law Institute, 1 Restatement (Third) of Foreign Relations Law of the United States § 334(1), at 213 (1987) (hereinafter Restatement (Third) ("An international agreement may be amended by agreement between the parties.") (emphasis added); Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, Art. 39, 40, U.N. Doc. A/Conf.39/27 (1969), reprinted in 8 I.L.M. 679 (1969) (hereinafter "Vienna Convention").

> embodying the terms of an arrangement with a foreign power . . . a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it.

New York Indians v. United States, 170 U.S. 1, 23 (1898). Former Legal Adviser Abraham Sofaer has recently argued that, when interpreting treaties, "a President should act only in good faith and should . . . avoid changing established and accepted norms." Abraham D. Sofaer, Treaty Interpretation: A Comment, 137 U. Pa. L. Rev. 1437, 1448 (1989).[24] As petitioner notes, the United

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[24]The Rapporteur of the Special Working Committee on Legal Aspects of Current Issues of Arms Control and Disarmament Policy of the American Society of International Law has recently delineated an eight-factor test to determine the appropriate interpretation of a treaty: what the Senate said when providing advice and consent; what was said to the Senate by the executive branch prior to ratification to create an understanding of the treaty; the attitude of the other party to competing treaty interpretations; how much support there is in the treaty text and record for the two interpretations; the record of subsequent practice of the treaty parties; how different the new interpretation is from the old; whether the new interpretation purports to create new obligations; and whether there are any changed circumstances that affect the treaty. See David A. Koplow, Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U. Pa. L. Rev. 1353, 1418-25 (1989). In this case, these factors overwhelmingly favor the prevailing interpretation of the extradition treaty: neither the Senate nor Mexico contemplated that forcible abduction would be a permissible means for obtaining jurisdiction over a national of the other state; the executive's representations are consistent with the prevailing interpretation; Mexico has

States is currently a "party to more than 100 extradition treaties, some of which are more than a century old," and some of which draw verbatim from the text of the U.S.-Mexico accord. JD Br. at 27. If petitioner's reading is correct, all of these extradition treaties could be reconstrued to permit forcible extraterritorial abductions over the objections of the treaty partner.[25] Under petitioner's reading, our treaty partners could invoke such a reinterpretation to forcibly abduct U.S. nationals on U.S. soil, over our government's repeated and vociferous objections. This Court should not sanction such a chaotic and lawless result.

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strongly objected to the reinterpretation; the text and record provide no support for the permissibility of forcible abduction; a practice of unconsented forcible abductions would dramatically disrupt the prevailing practice of consensual extraditions and renditions; the new interpretation amends existing obligations; and no evidence exists that circumstances have substantially changed since the treaty was entered.

[25]Eleven of our current extradition treaties have provisions similar to Article 9. See Resp. Br. at 12, n.6 (listing treaties). At a minimum, petitioner's argument would also purport to read an implied kidnapping term into those treaties as well. Significantly, both Canada and Mexico, our contiguous neighbors most likely to be adversely affected by petitioner's reinterpretation, have filed amicus briefs urging affirmance of the Ninth Circuit's ruling.

III. THIS COURT SHOULD NOT SANCTION AN EXECUTIVE REINTERPRETATION OF A TREATY THAT NULLIFIES THE TREATY BY VIOLATING THE NORMS OF INTERNATIONAL LAW THAT GAVE IT RISE.

Even if lower executive officials could unilaterally reinterpret a treaty, they should not be able to reinterpret that treaty so as to fundamentally violate the norms of customary international law that shape its object and purpose. The parties negotiated this treaty to avoid fractious disputes, to protect territorial sovereignty from forcible intrusions, and to protect individual suspects from arbitrary arrests and detentions. By reinterpreting the treaty, petitioner has provoked precisely the kind of contentious dispute, territorial invasion, and arbitrary arrest that the treaty was designed to prevent. If executive officers can turn the treaty on its head, and reinterpret it to mean the very opposite of the parties' original intent, they will have arrogated to

themselves the power not just of unilateral treaty amendment, but of unilateral treaty nullification.[26]

A. This Court Must Construe the Extradition Treaty in Accordance With Its Object and Purpose and Well-Settled Rules of International Law.

Petitioner claims that the absence in the extradition treaty of any language expressly forbidding the signatories from making arrests in each other's territory effectively authorizes forcible state-sponsored abductions. Yet treaty construction cannot transpire in a vacuum, in which established international-law rules and centuries of historical practice are simply ignored.

This Court has long recognized that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains...." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See also U.S. v.

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[26]In Goldwater v. Carter, this Court declined to review, on justiciability grounds, presidential termination of a bilateral treaty in accordance with its terms. See 444 U.S. 996 (1979) (one Justice concluding that the case was not ripe and four Justices concluding that it presented a political question). But this Court has never sanctioned nullification of a treaty by lower executive actors in a manner nowhere contemplated by the treaty itself.

PLO, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988). That interpretive principle applies with even greater force with regard to the construction of treaties, which generally arise through the formalization or codification of preexisting norms of customary international law.

The Vienna Convention on the Law of Treaties provides a general rule of treaty interpretation:

> There shall be taken into account together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.

Vienna Convention, supra note 23, art. 31(3) (emphasis added).[27] This rule, known as the principle of consistency, makes clear "that the contracting parties [to a treaty] intend something reasonable and something not inconsistent with generally recognized principles of International Law." Lassa Oppenheim, International Law 952 (H. Lauterpacht ed., 8th ed.) (footnotes omitted). "In accordance with the principle of consistency, treaties should be interpreted in

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[27]The State Department has stated that "the convention is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971).

the light of existing international law." Joseph G. Starke, An Introduction to International Law 480 (10th ed. 1989). United States courts have regularly applied this principle in extradition cases. See, e.g., United States v. Rauscher, 119 U.S. 407, 429 (1886) (construing Webster-Ashburton Treaty consistently with customary international law).

The Vienna Convention further specifies that

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Vienna Convention, Art. 31(1) (emphasis added). That principle has been adopted virtually verbatim in Section 325 of the Restatement (Third), supra note 23, and is regularly applied by federal courts. See, e.g., Day v. Trans World Airlines, 528 F.2d 31, 33 (2d Cir. 1975) (applying Vienna Convention rule in interpreting multilateral treaty).

Thus, the question whether the extradition treaty between the United States and Mexico permits unconsented, forcible state-sponsored abductions must be considered in light of both the

international law norms that gave rise to the treaty and the treaty's broader object and purpose.

B. Forcible, Unconsented, State-Sponsored Abductions Defeat the Object and Purpose of an Extradition Treaty and Violate Settled Rules of Both Customary and Conventional International Law

This Court has long recognized the sanctity of state sovereignty as perhaps the most fundamental principle of international law. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions [to such absolute jurisdiction] must be traced up to the consent of the nation itself." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court, 482 U.S. 522, 557 n.12 (1987). Thus, "the first and foremost restriction imposed by international law upon a State is that--failing the existence of a permissive rule to the contrary--it may not exercise its power in any form in the territory of another State." See The S.S. Lotus, P.C.I.J., (ser. A) No. 10, at 18 (1927) (emphasis added). This central norm of

customary international law has been codified in numerous treaties to which both Mexico and the United States are parties.[28]

Forcible, state-sponsored abduction of a national from his own country violates the international norm of territorial sovereignty, and breaches core norms of customary international law[29] and binding treaties.[30] Such abductions not only offend

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[28]The U.N. Charter provides that

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .

U.N. Charter art. 2, para. 4. Similarly, article 17 of the Charter of the Organization of American States provides in even more stringent terms:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever....

Charter of the Organization of American States, done at Bogota April 30, 1948, entered into force Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. Protocol of Amendment, done at Buenos Aires, Feb. 27, 1967, entered into force, Feb. 27, 1970, 21 U.S.T. 607, T.I.A.S. No. 6847.

[29]"A State must not perform acts of sovereignty in the territory of another State." 1 Lassa Oppenheim, International Law 295 (H. Lauterpacht ed., 8th ed.) (1955). "It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime." Id. n.1. "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Restatement (Third), supra note 23, § 432(2) at 329.

state sovereignty, but also international human rights norms expressed in international declarations and conventants.[31] These

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[30]United States courts have held that forcible abductions of fugitives by U.S. agents violate both the U.N. and O.A.S. Charters, unless the other state consents or acquiesces. United States ex. rel. Lujan v. Gengler, 510 F.2d 62, 66-68 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974). Responding to Israel's kidnapping of former Nazi Adolph Eichmann from Argentina, the Security Council construed Article 2(4) of the United Nations Charter to prohibit forcible abduction without consent or acquiescence by the asylum state. See U.N. Security Council Resolution 138, 15 U.N. SCOR, U.N. Doc. S/4349, Resolutions and Decisions at 4 (June 23, 1960).

[31]The Universal Declaration of Human Rights, for example, provides that "[n]o one shall be subjected to arbitrary arrest, detention, or exile." Art. 9, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). Article 9(1) of the International Covenant on Civil and Political Rights similarly declares that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967). The Human Rights Committee established under the Optional Protocol to the Covenant has held that abduction of a Uruguayan refugee from Argentina by Uruguayan agents constituted a violation of article 9 and that Uruguay was therefore required to provide an effective remedy, including immediate release of the refugee with permission to return to Argentina. See Views of the Human Rights Committee on the Complaint of Lopez, July 29, 1981, 36 U.N. GAOR Supp. (No. 40) at 176-184, U.N. Doc. A/36/40 (1981). The Inter-American Convention on Human Rights also forbids arbitrary arrest, art. 7(3), and provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State party concerned or by a law established pursuant thereto." The Inter-American Convention on Human Rights, Art. 7(2), Nov. 22 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

norms define respondent's rights and provide the background against which this Court must interpret the extradition treaty.

Extradition treaties reinforce these norms because they exist precisely to protect territorial sovereignty and individual freedom from arbitrary detention. They serve the over-arching purpose of preventing international conflict by providing agreed-upon standards whereby parties may cooperate to avoid retaliatory invasions of territorial sovereignty.[32]

Petitioner ignores the extradition treaty's broad purposes of reducing interstate conflicts, protecting territorial sovereignty, and minimizing arbitrary detentions. Instead, petitioner maintains that extradition treaties serve only the narrow purpose of imposing "obligations on the contracting parties to surrender criminal

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[32]Absent a treaty, the principle of territorial sovereignty gives each nation the unqualified right to provide asylum to anyone within its territory. Jaffe v. Smith, 825 F.2d 304, 306 (11th Cir. 1987). Before the proliferation of extradition treaties during the nineteenth century, European states commonly granted asylum to fugitives from other states, with the result that

> a sovereign could enforce the return of fugitives only by force of arms. . . . Extradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after World War I.

M. Cherif Bassiouni, supra note 4, at 6.

fugitives."[33] JD Br. at 14. But were this the treaty's sole object and purpose, there would be no explanation for its articles that serve to safeguard fugitives' rights and sovereign prerogatives, even where those interests inhibit the prosecution of crime.[34]

The object and purpose of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual rendition of fugitives, but do prohibit state-sponsored abductions. When a state delivers a fugitive to another by informal rendition, it waives whatever treaty rights it may have

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[33]Petitioner must take such a narrow view of the extradition treaty's purpose, because even a slightly broader view--that they are designed to protect territorial sovereignty, facilitate law enforcement, and protect suspects' rights--compels the conclusion that the DEA agents who arranged Dr. Alvarez's abduction themselves committed serious crimes (kidnapping, abduction, and false imprisonment) that are extraditable under the U.S.-Mexico treaty. See Treaty appendix, cl. 4, reprinted in J.A. at 85. See also Requests of the United Mexican States to the United States for the provisional detention of DEA Special Agent Hector Berrellez, J.A. at 53 (seeking DEA agent's extradition under treaty).

[34]See, e.g., United States-Mexico Treaty provisions barring double jeopardy (art. 6), limiting extradition to a specific list of serious crimes (art. 2), permitting either nation to refuse to extradite its own citizens regardless of their crimes (art. 9), and prohibiting extradition for political offenses (art. 5). These articles do not make the treaty more effective as a weapon in the fight against crime; they serve the larger purposes of protecting suspects in one state from arbitrary proceedings in the other and controlling controversies between the signatories over the surrender of fugitives.

to grant asylum or to provide the fugitive with the safeguards of the extradition process. But such a rendition, whether motivated by comity, good will, or mutual convenience,[35] in no sense offends the fundamental purpose of extradition treaties: to forestall international conflicts. Extradition treaties have never been held to exclude informal delivery of fugitives by one state to another, because when one state willingly surrenders a fugitive, there is no international dispute to prevent or control.[36]

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[35]In 1823, Chief Justice Tilgman of Pennsylvania recognized that, absent treaty-based standards, requests for delivery of fugitives pose a danger to peaceful relations. In the absence of a treaty, he noted one nation could ask another to deliver a fugitive "as a matter of courtesy, good will, and mutual convenience. But a refusal to grant such a request is no just cause for war." Commonwealth v. Deacon, 10 Serg. & Rawle 125, 131 (1823). This Court has similarly distinguished interstate abductions, of the kind that it permitted in Frisbie v. Collins, 342 U.S. 519 (1952), from international abductions like the one challenged here, on the ground that states, unlike sovereign nations, "cannot declare war or authorize reprisals on other States." Mahon v. Justice, 127 U.S. 700, 705 (1888).

[36]See, e. g., United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (informal surrender of fugitive does not violate extradition treaty); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975) (same); Restatement (Third), supra note 23, § 475, reporters' note 6, at 566 (citing cases). Even when states agree, however, "if the disguised extradition involves unconscionable conduct [offending individual rights], considerations of due process and human rights may lead to discharge of the accused." Id.

Forcible, unconsented, state-sponsored abductions, by contrast, violate the fundamental object and purpose of extradition treaties. By circumventing a state's treaty rights and invading territorial sovereignty, they provoke precisely the kind of international dispute that extradition treaties were designed to prevent.[37] Moreover, they undermine the goal of minimizing arbitrary arrests and detentions in order to facilitate criminal prosecutions at all costs.[38]

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[37]Following the abduction of Adolph Eichmann from Argentina, for example, the United Nations Security Council declared that such abductions involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace. See U.N. Security Council Resolution 138, 15 U.N. SCOR, U.N. Doc. S/4349, Resolutions and Decisions at 4 (June 23, 1960).

[38]To justify extending the Ker-Frisbie rule to this case, petitioner reiterates that foreclosing respondent's U.S. prosecution is "too high a price for society to pay" for an unlawful arrest. JD Br. at 8, 17. Yet petitioner weighs in the balance only the price of lost United States prosecutions, simply ignoring the countervailing costs that forcible abductions inflict upon international cooperation, territorial sovereignty, respondent's right to be free from arbitrary arrest, and forgone Mexican prosecutions. Petitioner overlooks that the Ker-Frisbie rule developed in the context of interstate abductions, which necessarily impose fewer costs on society because states of the union cannot "authorize reprisals on other states," Mahon v. Justice, 127 U.S. 700, 705 (1888), but can effectively prosecute agents of sister states who abduct their citizens.

C. No Serious Dispute Exists Regarding Respondent's "Standing" to Raise the Treaty Violation.

If the state whose sovereignty has been violated protests the violation of its treaty rights and demands the abductee's return, as Mexico has repeatedly done here, a court may not ignore its protest and try the abductee without condoning and perpetuating the treaty violation. Even if the extraditing state waives its treaty rights, U.S. courts have held that a kidnapped defendant can assert the violation of an extradition treaty--which offends not just his country's rights, but his personal right to be free from arbitrary arrest and detention--to defeat the court's jurisdiction.[39] When a state unambiguously demands its national's return, it becomes even

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[39] See, e.g., United States v. Rauscher, 119 U.S. 407 (1886) (defendant delivered pursuant to an extradition order or its equivalent has standing to challenge a violation of that order without having to prove that the extraditing state objects); United States v. Therion, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("[t]he government's argument that Therion lacked standing to complain of a violation of the treaty is without merit"); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (per curiam) ("the person extradited may raise whatever objections the rendering country may have"), cert. denied, 479 U.S. 1009 (1986); United States v. Vreeken, 603 F. Supp. 715, 717 (D. Utah 1984) ("the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty"), aff'd, 803 F.2d 1085 (10th Cir. 1986), cert. denied, 479 U.S. 1067 (1987).

clearer that the national may invoke the extradition treaty and his nation's demand to defeat the court's jurisdiction.[40]

Petitioner's claim that only Mexico, and not Dr. Alvarez, has "standing" to raise the treaty violation is therefore meritless. See generally Resp. Br. at 46-53. This case has nothing to do with "standing," in the traditional sense that a civil plaintiff must show injury in fact, causation, and redressability sufficient to satisfy the "case or controversy" requirement of Article III.[41] United States courts have regularly granted relief to criminal defendants, such as

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[40]See, e.g., United States v. Toscanino, 500 F.2d 267, 275, 277 (2d Cir. 1974) (barring the court's acquisition of power over the person of a suspect "kidnapped and forcibly brought within the jurisdiction," "in violation of international treaties of the United States" when the court's "acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct"); U.S. ex rel Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975) ("hold[ing] only that given Lujan's failure to allege that Argentina or Bolivia protested his abduction . . . there is no justification for ordering the district court to divest itself of jurisdiction over him"); Restatement (Third), supra note 23, § 432, comment c, at 329-30 ("If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.") (emphasis added); id., reporters' note 2, at 331 (the proposition that "only states, and not individuals, may raise objections to violations of international law" has "been largely abandoned as [a] general princip[e] . . .").

[41]See generally William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988).

respondent, who are threatened with prosecution in violation of the terms of an extradition treaty.[42] Moreover, this Court has long recognized that even civil plaintiffs may directly invoke treaties of friendship, commerce and navigation, which similarly confer rights upon both states and individuals, and from which American extradition treaties historically derive.[43]

Dr. Alvarez may invoke the extradition treaty in his defense in precisely the same way that any criminal defendant may invoke the doctrine of federal preemption or jurisdictional limits in the federal statute under which he is being prosecuted. As in such cases, he may invoke the treaty not because "it grants him standing,"

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[42]See, e.g. U.S. v. Rauscher, 119 U.S. 407 (1886); Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936).

[43]See, e.g., Asakura v. City of Seattle, 265 U.S. 332 (1924) (enforcing U.S.-Japan Friendship, Commerce, and Navigation treaty at the request of an individual). "Such extradition provisions as did exist [in early treaties] were included only incidentally in treaties of peace and alliance, in which the willingness to deliver up the criminals of the other party was just one of a number of gestures of friendship and cooperation." I. Shearer, Extradition in International Law 6 (1971). Indeed, the earliest American treaty to provide for extradition, the Jay Treaty of 1794, was just such a treaty of amity, commerce, and navigation, containing an agreement to extradite in article 27. See 1 W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers (1776-1909), at 590 (1910).

but because under Article VI, cl. 2 of the Constitution, the treaty is the "supreme Law of the Land," and acts as a self-executing limitation upon unlawful government action.

D. No United States Court Has Ever Tried an Illegally Kidnapped Foreign National, Brought Here In Violation of a Valid Extradition Treaty, Over the Treaty Partner's Repeated Protests.

Before the Ninth Circuit in Verdugo, petitioner conceded that

> in no reported case has a court held that officially authorized or sponsored kidnapping did not violate an extradition treaty when the country from which the defendant was kidnapped objected to the abduction.

United States v. Verdugo-Urquidez, 939 F.2d 1341, 1346 (9th Cir. 1991). Petitioner now claims that the issue has not arisen before because no defendant has ever successfully claimed forcible abduction from another jurisdiction as a defense in criminal proceedings. Petition in United States v. Verdugo-Urquidez, No. 91-670 at 8. In reality, the issue has never arisen because the

United States has never before made a practice of disregarding extradition treaties and trying suspects whom it has kidnapped.[44]

Petitioner reasons that the U.S.-Mexico extradition treaty silently authorized forcible abductions, because it did not expressly forbid them. But the treaty's silence regarding state-sponsored kidnapping resulted from the parties' contemporaneous understanding that international law prohibited one sovereign from forcibly violating the territory of another. The treaty also does not expressly forbid the United States from entering Mexico and summarily executing criminal suspects. But as with forcible

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[44]Those nations which have seized fugitives in violation of another nation's territory have usually returned the fugitive upon the other state's demand. See Restatement (Third), supra note 23, § 432 and reporters' note 3 ("Under prevailing practice . . . states ordinarily refrain from trying persons illegally brought from another state . . . if that state demands the person's return."). In 1872, for example, the Attorney General ordered the release and dismissal of charges against Rufus Bratton, a U.S. citizen who had been abducted from Canada by a police detective from South Carolina. John Bassett Moore, A Treatise on Extradition and Interstate Rendition § 190 (1891). A century later, U.S. agents crossed the Canadian border in hot pursuit of a U.S. deserter and seized him fifty yards inside Canada, but returned him as soon as Canada protested. 1 M. Cherif Bassiouni, International Extradition: United States Law and Practice 235 (2d rev. ed. 1987). Nor is the Mexican case involving Antonio Martinez, cited in JD Br. at 28 n.23, an exception to this rule. That case involved a private abductor, acting without governmental authority, whose actions violated no treaty obligation of the United States. See id.

abductions, no such express prohibition was required because the practice was already plainly proscribed by background norms against which the treaty was drafted. Indeed, only two months after the treaty entered into force, the Justice Department's Office of Legal Counsel (OLC) explicitly recognized these background norms, issuing an opinion entitled "Extraterritorial Apprehension by the Federal Bureau of Investigation." 4B Op. Off. Leg. Counsel 543 (March 31, 1980). That opinion concluded that "the FBI only has lawful authority [to engage in extraterritorial apprehension] when the asylum state acquiesces to the proposed operation." Id. at 544. The OLC reasoned that

> a forcible abduction, when coupled with a protest by the asylum state is a violation of international law. . . . It is regarded as an impermissible invasion of the territorial integrity of another state. . . . Nor do there appear to be any doctrines of self-help or self-defense applicable in this context.[45]

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[45] Id. at 549. The 1980 OLC opinion also concluded that the FBI could not make apprehension in contravention of international law under its general enabling statutes, reasoning that those statutes must be construed restrictively to prohibit any departure from the standards of international law. Id. at 551-53.

In June 1989, less than a year before Dr. Alvarez was abducted, the Office of Legal Counsel issued a secret opinion partially reversing the 1980 opinion.[46] As the title of his statement regarding that opinion suggests, then-Assistant Attorney General William P. Barr explicitly conceded that such extraterritorial apprehensions "depart from international law," but contended that the President could override customary international law.[47] In so saying he specified that the "1989 opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties," a category that has

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[46]See Statement of William P. Barr, Assistant Attorney General for the Office of Legal Counsel on the Legality As a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law, Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives at 8 (Nov. 8, 1989). Mr. Barr testified that "the content of the 1989 Opinion . . . must remain confidential, [but] I am happy to share with the Committee our legal reasoning and conclusions." Id. at 3.

[47]Mr. Barr reasoned that "the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law (as with the consent of a foreign sovereign), or when the agency has been directed to do so by a 'controlling executive act' that supplants customary international law." Id. at 8 (emphasis added).

traditionally included extradition treaties. Id. at 4. See Resp. Br. at 46-53 (demonstrating that extradition treaties are self-executing).

Until this case, the Justice Department has never claimed a general executive authority not simply to override customary international law, but to nullify a duly ratified treaty without the advice and consent of the Senate, over the repeated protest of our treaty partner, and in flagrant violation of well-established norms of international law.[48] The courts below wisely declined the Department's invitation to engage in sweeping judicial revision of an unambiguous, painstakingly negotiated treaty. This Court should similarly reject the Justice Department's effort to stand the U.S.-Mexico extradition treaty on its head by effecting a unilateral reinterpretation that would rob the treaty of operative force.

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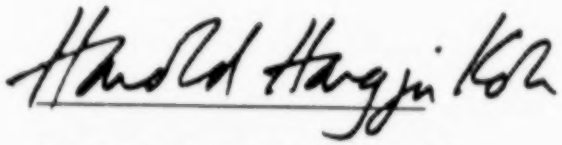
[48]Nor has the Justice Department identified any "controlling executive act," presidential or otherwise, that was expressly intended to supplant international law in this case. Absent such an act, "[i]nternational law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully Submitted,



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Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

On Writ of *Certiorari* To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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No. 91-712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

On Writ of *Certiorari* To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1/]

Amicus Curiae the Association of the Bar of the City of New York has a great interest in the questions presented by this case: whether the abduction of a foreign national by the United

1/ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court, pursuant to Rule 37.3 of the Rules of this Court.

States Government from another country with whom the United States has an extradition treaty[2/] to face criminal prosecution in the United States violates that treaty, and whether the abducted foreign national may properly raise that treaty violation as a defense to the United States' court's jurisdiction over him.

The Association of the Bar of the City of New York ("the Association") is a professional association of approximately 19,000 lawyers throughout the United States and in over forty other countries. Since its inception in 1870, the Association has been dedicated to the preservation and advancement of the rule of law and the fair administration of justice. The scope of the Association's concern with justice has not been limited to the confines of the City of New York but extends beyond local borders.

For many years the Committee on International Human Rights has been a standing committee of the Association. A 1985 Resolution of the Association states that "the Association of the Bar of the City of New York affirms its support for the Rule of Law in the international community ..." In its efforts to promote the rule of law, the Association has issued reports on international agreements and pending United States legislation relating to international human rights; filed *amicus* briefs in relevant court cases; intervened on behalf of foreign lawyers and judges who have been persecuted or imprisoned for exercising their professional responsibilities; and

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[2/] The extradition treaty at issue in this case is that between the United States and Mexico, May 4, 1989 31 U.S.T. 5059, T.I.A.S. No. 9656 (the "Extradition Treaty").

sent delegations to several countries and published the reports of their findings.[3/]

This case is of vital importance to the Association. The Association respects and supports the principle that international relations ought to be governed by and conducted in accordance with the rule of law. The recent much-heralded end of the "Cold War" presents the first opportunity in generations for the community of nations to structure a new international order based on respect for the rule of law under which nations will conduct themselves in accordance with their multilateral and bilateral obligations, particularly those obligations imposed by treaties into which they have freely entered.

The outcome of this case, *i.e.*, whether this Court will permit the United States to circumvent its solemn extradition treaty obligations by authorizing forcible abductions of foreign nationals from their own countries to face criminal prosecution in the United States, bears directly on the larger question of whether the community of nations chooses to conduct its own affairs in accordance with the rule of law.

As an organization of lawyers concerned with the enforceability of international law and treaty obligations, the Association is especially troubled by the Government's argument that courts are powerless to remedy forcible abductions that circumvent and violate extradition treaties because such matters raise nonjusticiable "political questions" or the abducted defendants lack standing to

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[3/] *See, e.g., Justice in El Salvador: A Report of a Mission of Inquiry*, 38 Record of the Association 112 (Mar. 1983); *Human Rights and the Administration of Justice in Chile*, 42 Record of the Association 431 (May 1987); *Criminal Justice and Human Rights in Northern Ireland*, 43 Record of the Association 110 (Mar. 1988).

raise such treaty violations as a defense. The argument, if accepted, would force courts effectively to abet such violations and deprive the extradition treaties of the force of law. Accordingly, while the Association supports the arguments made by the respondent and other *amici* that the extradition treaty precludes abduction as a means for securing criminal jurisdiction, the Association limits its *amicus* brief to the issues of justiciability and standing raised by the Government.

SUMMARY OF ARGUMENT

A. The Court of Appeals[4/] correctly held that the issues presented in this case are justiciable and are not political questions requiring this Court to defer to the Executive Branch. Rather, this case involves the interpretation of an extradition treaty entered into by the United States—an exercise that this Court has long considered outside the realm of the political question doctrine. *Baker* v. *Carr*, 369 U.S. 186, 211 (1962); *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 229-230 (1986).

Moreover, courts have traditionally interpreted extradition treaties and issues relating to them and have traditionally rejected attempts to preclude judicial review under the guise of the political question doctrine. *United States* v. *Rauscher*, 119 U.S. 407 (1886); *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1977); *In re Mackin*,

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[4/] Petitioner, United States of America (the "Government") appeals from the decision issued on October 18, 1991 by the Court of Appeals in *United States* v. *Alvarez-Machain*, ("Alvarez-Machain") 946 F.2d 1466 (9th Cir. 1991), which decision relied on the Court of Appeals' decision in a case that raised virtually the same issues—*United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *petition for cert. pending*, No. 91-670 ("*Verdugo-Urquidez*"). In *Alvarez-Machain*, the Court of Appeals held that its decision in *Verdugo-Urquidez* applied *a fortiori* to the instant case. 946 F.2d at 1466.

668 F.2d 122, 132-33 (2d Cir. 1981); *Eain* v. *Wilkes*, 641 F.2d 504, 513-16 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981); *Quinn* v. *Robinson*, 783 F.2d 776, 790-91 (9th Cir. 1986).

B. The Court of Appeals correctly held that respondent has standing to assert the United States' violation of the Extradition Treaty as a defense to the district court's jurisdiction over him. This Court held long ago that individual defendants have standing to raise violations of extradition treaties as defenses to criminal prosecutions in United States courts. *United States* v. *Rauscher*, 119 U.S. 407 (1886). *See also Ford* v. *United States*, 273 U.S. 594 (1927); *Cook* v. *United States*, 288 U.S. 102 (1933). Extradition treaties are intended to protect not only the interests of the contracting states, but also the interests of individuals in the territory of one contracting state whom the other state wishes to prosecute in its courts.

ARGUMENT

I.

PERMITTING RESPONDENT TO RAISE THE UNITED STATES' VIOLATION OF THE EXTRADITION TREATY AS A DEFENSE WOULD NOT PRESENT THE COURT WITH A NONJUSTICIABLE POLITICAL QUESTION

The Court of Appeals correctly rejected the Government's contention that permitting respondent to raise the legality of his abduction from Mexico under the Extradition Treaty as a defense would entail any nonjusticiable political questions because they potentially touch upon foreign affairs. As this Court observed in *Baker* v. *Carr*, 369 U.S. 186, 211 (1962), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[5/]

Courts have consistently held that issues involving claimed violations of international law, including the United States' obligations under its treaties, are justiciable and outside the realm of the political question doctrine. *DKT Memorial Fund, Ltd.* v. *Agency for International Development*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("[w]hereas attacks on foreign policy making are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes

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[5/] "[N]onjusticiability based on [a] 'political question' is *at best a limited* doctrine." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (emphasis in original).

may have an effect on foreign affairs").[6/] Indeed, in *Baker* v. *Carr*, 369 U.S. at 212, the Government's primary authority for the application of the political question doctrine, this Court plainly stated that the doctrine does not apply to the interpretation of treaties:

> For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action ... must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. [citations omitted].[7/]

Moreover, courts have routinely interpreted extradition treaties and have declined to apply the political question doctrine in cases involving extradition issues. In *United States* v. *Rauscher*,

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[6/] This principle has been applied in numerous recent cases in a wide variety of areas. *See, e.g., Boos* v. *Barry*, 485 U.S. 312 (1988) (the protection of diplomats); *Wardair Canada, Inc.* v. *Florida Department of Revenue*, 477 U.S. 1 (1986) (sensitive aviation relations); *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (asylum determinations).

[7/] See also *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 229-230 (1986) ("As *Baker* [v. *Carr*] plainly held, however, the courts have the authority to construe treaties and executive agreements..."); *B. Altman & Co.* v. *United States*, 224 U.S. 583, 601 (1912):

> We think that the purpose of Congress [in enacting the Circuit Court of Appeals Act 1891] was manifestly to permit rights and obligations [involving the construction of treaties] to be passed upon in the Federal court of final resort, and that matters of such vital importance arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review of the highest court of the Nation.

119 U.S. 407 (1886), this Court interpreted the 1842 Webster-Ashburton Treaty between the United States and Great Britain as providing an implied rule of specialty.[8/] As a result, this Court overturned the conviction of the defendant who was tried and convicted of a crime other than that for which he was extradited pursuant to the terms of the treaty.[9/]

In *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1977), the Court of Appeals interpreted the extradition treaty between the United States and Canada as incorporating a double jeopardy provision. Significantly, the Court rejected the interpretation of the treaty espoused by the Executive Branch, stating that "[w]hile the views of the State Department are entitled to respect ... they are not controlling." 568 F.2d at 239.

In *In re Mackin*, 668 F.2d 122 (2d Cir. 1981), the Court of Appeals grappled with the issue of whether a United States Magistrate had jurisdiction to decide whether an offense committed by the person sought to be extradited to Great Britain was a "political offense" under the extradition treaty between the United

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[8/] This Court rejected the State Department's narrow interpretation of the Webster-Ashburton Treaty against a background of continuing controversy between executive officials in the United States and Great Britain as to the treaty's scope, because the issue was properly raised by the defendant and his liberty depended on the answer. 119 U.S. at 411, 415-416.

[9/] Similarly, in *Cook* v. *United States*, 288 U.S. 102 (1933), although involving the seizure of property rather than of persons, this Court permitted the petitioner to rely upon a 1924 treaty between the United States and Great Britain that regulated the boarding by U.S. officials of British vessels located in international waters to protest the seizure of a vessel in international waters. This Court held that the vessel's seizure violated the treaty and was unlawful. 288 U.S. at 121.

States and the United Kingdom. The Government argued, *inter alia*, that the issue of whether an offense is a political offense was a nonjusticiable political question. Again, the court rejected the Government's argument, stating as follows:

> The Government notes that a judicial decision on the political offense exception may cause difficulties in this country's foreign relations; such difficulties would exist also, indeed might be heightened, if decision were placed solely in the executive branch, unless the political offense exception were to be eviscerated in practice in the case of extradition treaties with nations with which we are allied or whose favor we especially desire.

668 F.2d at 133. The court recognized the perception from the early days of the nation that extradition without judicial oversight was "highly dangerous to liberty, and ought never to be allowed in this country", *citing In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852). 668 F.2d at 134.

Further, in *Eain* v. *Wilkes*, 641 F.2d 504, 513-18 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), the Court of Appeals rejected the Government's attempt to prevent the court from reviewing the Government's position on the extradition of a prisoner to Israel. The Government argued that the court should abstain from reviewing extradition under the treaty at issue in order to avoid potential embarrassment for the Executive if the court's reading of the treaty differed. The Court of Appeals held that it could "construe [the] treaty and ... find it provides the answer." 641 F.2d at 514, *quoting Baker* v. *Carr*, 369 U.S. at 212. *See also Shapiro* v. *Fernandina*, 478 F.2d 894, 906 (2d Cir. 1973) ("[W]hile the conduct of foreign affairs is almost exclusively an executive function, extradition has, at least in the United States ... been generally a matter of judicial competence."); *Quinn* v. *Robinson* 783 F.2d 776, 790-91 (9th Cir. 1986) (Court of Appeals

rejected Government's attempt to preclude judicial review of extradition proceeding under political question doctrine).

As the Court of Appeals noted, the Government ignores the best evidence of courts' power to interpret extradition treaties and supervise the extradition process. Congress has expressly delegated to the courts the responsibility for determining whether persons within the United States may be extradited to another nation pursuant to a treaty. *See* 18 U.S.C. § 3184 (1988). The Court of Appeals correctly noted that "[i]n so doing, Congress entrusted to the courts the power to make precisely the kinds of interpretive decisions at issue in this case ... [c]ontrary to the government's suggestion, a judge who determines that a defendant has been brought into court in violation of an extradition treaty has not 'injected' the judiciary into a political dispute ... [h]e or she has merely carried out the court's constitutional function in light of the statutes Congress has seen fit to pass and the treaties it has ratified." *Verdugo-Urquidez*, 939 F.2d at 1357.

The Government's arguments in support of the application of the political question doctrine to this case are wholly without merit. First, the Government contends that the Court of Appeals' judgment authorizes judges to receive and weigh diplomatic communications addressed to the State Department—a task that courts are ill-equipped and not authorized to handle. Pet. Brief, at 38-39. The Government ignores the fact that in this case, the Government of Mexico communicated not only with the State Department but also directly with the court. J.A. 67. Moreover, courts often are authorized to make determinations based on communications they receive from foreign states. For example, the federal district courts are authorized to hear defenses to their jurisdiction raised by foreign states under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et. seq.*, or under the Act of

State Doctrine.[10/] In any event, the communication from the Government of Mexico unambiguously objects to the abduction as a violation of the Extradition Treaty.[11/] There are, therefore, no diplomatic issues for the court to weigh. It need only interpret the Extradition Treaty to determine if the abduction is a violation of its terms.

Significantly, *Ex parte Peru*, 318 U.S. 578 (1943), cited by the Government in its Brief, undermines the Government's argument that the courts cannot consider diplomatic communications. In *Ex parte Peru*, this Court recognized that district courts often receive and analyze communications from foreign governments. In discussing the district court's role in resolving sovereign immunity

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[10/] This Court often has found cases to be justiciable even though communications with foreign governments were integral to the issues presented. *See e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *United States* v. *Belmont*, 301 U.S. 224, 230 (1937).

[11/] In its first diplomatic note of April 18, 1990, the Government of Mexico sought information "about the possible participation of U.S. authorities in [Respondent's] kidnap and transfer to the United States." J.A. 33. In its second diplomatic note dated May 16, 1990, the Government of Mexico stated that it "considers that the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. Government, in violation of the procedure established in the extradition treaty in force between the two countries," and requested respondent's return to Mexico. J.A. 35-36. On November 13, 1990, the Government of Mexico filed with the Court of Appeals a letter dated November 9, 1990 from Jose Angel Pescador Osuna, the Consul General of Mexico in Los Angeles, stating that the Government of Mexico considers respondent's abduction from Mexico to be a violation of the Extradition Treaty and requesting that he be repatriated to Mexico. J.A. 67.

issues (prior to the enactment of the Foreign Sovereign Immunity Act), this Court stated the following:

> Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for immunity existed ... [The Republic of Peru] has consistently declared its reliance on the immunity, both before the Department [of State] and in the district court. Neither method of asserting the immunity is inconsistent with the other.

318 U.S. at 587-89.

Second, the Government contends that the remedy of repatriation "cuts deeply into the government's authority to formulate this Nation's response the claim of an unlawful apprehension." Pet. Brief, at 39. Not surprisingly, the Government offers no support for this argument. This is because it is clear that the district court had authority to order the remedy of repatriation. Courts have inherent authority to protect themselves from complicity in an illegality or an injustice, *McNabb* v. *United States*, 318 U.S. 332, 341 (1943), and may do so by formulating procedural rules not specifically required by the Constitution or the Congress. *United States* v. *Hastings*, 461 U.S. 499, 505 (1983). See *Restatement (Third) of the Foreign Relations Law of the United States* § 432 (1986) (under international law, repatriation is the proper remedy where there has been an unauthorized abduction of a person by one nation from the territory of another nation). *See also United States* v. *Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (Oakes, J. concurring) ("[R]egardless of the abstract doctrine *Ker* and *Frisbie* are said to stand for, we can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an

abduction case as a matter not of constitutional law but in the exercise of our supervisory power ...")[12/] In any event, whether the district court acted within its powers in ordering the remedy of repatriation is irrelevant to the justiciablity of this issues in this case.

Third, the Government contends that the determination of whether the Government's interest in enforcing its criminal laws justifies violating the Extradition Treaty is a policy judgment that is not for the courts to make. Pet. Brief, at 40. This argument has no validity. The Government's interest in law enforcement has never been considered sufficient to allow the United States to break the law. In *Olmstead* v. *United States*, 277 U.S. 438 (1928), in his influential dissent, Justice Brandeis wrote the following:

> And if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem all the elements of a ratification. If so, the government itself would be a law breaker.
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> * * *
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> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.

[12/] The Government purports to find support for its contention in the federal extradition statute, 18 U.S.C. § 3186, which vests the Secretary of State with the final decision-making power to extradite an individual, even upon a determination that an extradition request is legally sufficient. Pet. Brief, at 39. The Secretary of State's power under 18 U.S.C. § 3186, however, presupposes that the extradition procedures have been complied with by the requesting state. In the instant case, the United States simply ignored the Extradition Treaty with Mexico.

> In a goverment of laws, existence of the government will be imperilled it it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. *To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.* [emphasis added].

277 U.S. at 484-85. *See Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

There is no reason why this principle, long accepted in our jurisprudence, should apply with any less force with regard to the United States' treaty obligations.

The Government further contends that the Court of Appeals' holding would undermine this nation's interest in enforcing its criminal laws by enabling violators of United States law to acquire immunity from prosecution by seeking refuge in nations that have extradition treaties with the United States but are unwilling to cooperate in bringing those persons to trial. Pet. Brief, at 40. The absurdity of this argument is self-evident. It is much more likely that violators of United States law would seek refuge in countries with whom the United States did *not* have extradition treaties. In any event, the Government's argument that kidnapping

is necessary to criminal law enforcement is undercut by the fact that the Government never even requested Mexico to extradite Respondent. Thus, the Government never found out whether Mexico was unable or unwilling to cooperate in bringing Respondent to trial in the United States.[13/]

Consequently, the Court of Appeals' holding that this case does not fall under the nonjusticiable political question doctrine should be affirmed.

[13/] The Government cites *The Chinese Exclusion Case*, 130 U.S. 581 (1889), in support of its contention that the determination of whether an extradition treaty violation should take precedence over the nation's interest in enforcing our criminal laws is a policy judgment that is not for the courts to make. Pet. Brief, at 40. *The Chinese Exclusion Case*, which held that where a treaty directly conflicts with a federal statute, the one adopted first in time controls, is inapposite. In this case, no criminal law of the United States conflicts with the Extradition Treaty's provision regarding the extradition of Mexican nationals by the Government of Mexico.

II.

RESPONDENT HAS STANDING TO CHALLENGE THE DISTRICT COURT'S EXERCISE OF JURISDICTION OVER HIM BASED ON THE UNITED STATES' VIOLATION OF THE EXTRADITION TREATY

A. This Court Has Consistently Held That Individuals Have Standing To Enforce Extradition Treaties

Courts in the United States have consistently held that individuals have standing to challenge a court's criminal jurisdiction based on violations of extradition treaties. In *United States* v. *Rauscher*, 119 U.S. 407 (1886), this Court held that the defendant had standing under the 1842 Webster-Ashburton Treaty between the United States and Great Britain to raise the rule of specialty[14/] to challenge the exercise of the district court's criminal jurisdiction over him.[15/] 119 U.S. at 424. Significantly, this Court held that

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[14/] Under the rule of specialty, a person who has been extradited to another state cannot, unless the requested state consents, be tried by the requesting state for an offense other than one for which he was extradited. Nor can an extradited person receive a more severe punishment than was provided by the requesting state at the time of the request for extradition. *See Restatement (Third) of the Foreign Relations Law of the United States*, § 477 (1986).

[15/] In *Rauscher*, Great Britain surrendered a fugitive to the United States under Article 10 of the Webster—Ashburton Treaty. Although the prisoner was extradited on the charge of murder, he was prosecuted and convicted on the lesser offense of cruel and unusual punishment, a crime for which he had not been extradited. This Court reversed the conviction.

a rule of specialty could be properly implied notwithstanding the absence of an express provision in the treaty incorporating the rule of specialty. 119 U.S. at 430.

Similarly, in *Ford* v. *United States*, 273 U.S. 594 (1927), this Court permitted individuals facing prosecution in the United States to raise a violation by the United States of a treaty between the United States and Great Britain to challenge the exercise of the district court's jurisdiction. In *Cook* v. *United States*, 288 U.S. 102 (1933), this Court again recognized individual standing under treaties.[16/] *See United States* v. *Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (*per curiam*), *cert. denied*, 479 U.S. 1009 (1986) ("the person extradited may raise whatever objections the rendering country may have.") *see also* 1 M. Bassiouni, *International Extradition: United States Law and Practice*, Ch. 2, § 4.1 at pp. 71-72; § 4.2 at p. 74 (2d ed. 1984).

The Government erroneously contends that respondent has no standing to assert a violation of the Extradition Treaty absent an express provision conferring standing to individuals. Pet. Brief, at 36. But the absence of a specific domestic enforcement mechanism in the Extradition Treaty does not vitiate an individual's ability to enforce its provisions because it is self-executing and thus needs no enabling legislation to render it directly enforceable in United States' courts. This Court has on numerous occasions sanctioned the private enforcement of treaties notwithstanding the absence of

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[16/] In *Cook*, the United States seized a British vessel at a distance of more than one hour from the U.S. shore. Article II of the treaty at issue provided that only seizures of vessels within a one-hour range would not evoke protest from Britain. The owners of the seized vessels challenged the exercise of jurisdiction over the vessels and this Court granted them standing to do so. 288 U.S. at 121-22. This Court concluded that, because the treaty deprived the United States Government of authority to order the seizure in this instance, the libels against the ship and cargo should be dismissed. 288 U.S. at 122.

an express enforcement mechanism in the treaty. *See, e.g., Asakura* v. *Seattle*, 265 U.S. 332 (1924); *Cook* v. *United States*, *supra*; *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150 (1940); *Clark* v. *Allen*, 331 U.S. 503 (1947).

The Government also contends that *Rauscher*, *Ford* and *Cook* are not controlling because they are limited to situations in which the treaty at issue expressly prohibits the alleged violative conduct. Pet. Brief, at 20–21. But *Rauscher*, *Ford* and *Cook* stand for the proposition that treaties, including extradition treaties, are not necessarily limited to their express terms; they may contain implied obligations or prohibitions to further the purposes of those treaties and the intent of parties. Contrary to the Government's contention, the treaties construed in *Rauscher*, *Ford* and *Cook* did *not* contain express provisions prohibiting the conduct ultimately found to be in violation of those treaties. As the Court of Appeals correctly noted, *Rauscher* and its progeny "stand for the uncontroversial proposition that in construing treaties we must look to their purposes and implicit assumptions as well as their express proscriptions and prescriptions," thus permitting courts to interpret treaties to include implied provisions. *Verdugo-Urquidez*, 939 F.2d at 1354.

The Government further contends that *Rauscher*, *Ford*, and *Cook* are limited to cases in which the United States has resorted to an extradition treaty to obtain jurisdiction but then undertaken prosecutions that violated its terms. Pet. Brief, at 21-22. On this argument, the United States could avoid any limits on criminal prosecutions by simply disregarding the extradition treaty altogether and resorting to abduction. As the Court of Appeals observed in *Verdugo-Urquidez*, 939 F.2d at 1351, the argument would render the terms of the extradition treaty meaningless. ("It would elevate form over substance to hold that [the] protection of each sovereign nation's right to insist on strict compliance with the treaty may be

circumvented if the other party simply chooses not to invoke the treaty at all.").

For example, Article V of the Extradition Treaty prohibits extradition for "political" offenses or "purely military" offenses. Article VIII gives each nation the discretion to refuse to extradite anyone who might be executed for an offense for which the death penalty could not be imposed in the requested nation. The Government's interpretation of the Extradition Treaty would permit the Government simply to ignore these prohibitions contained in the Treaty by permitting forcible abductions of foreign nationals from Mexico in situations where the Government wishes to try them in the United States for non-extraditable offenses.[17/]

Consequently, the Government's position demonstrates why it is imperative that individuals be permitted to assert that abductions are violations of the Extradition Treaty, because to hold otherwise would encourage the Government to abduct individuals without resorting to the procedures set forth in its extradition treaties in situations where it does not wish to be bound by their limitations. The Government cannot be permitted to obtain jurisdiction by unlawful means when it simply chooses not to do so by lawful means.

There is thus no valid distinction between the specialty cases, like *Rauscher*, and this case. As the Court of Appeals, in *Verdugo-Urquidez*, demonstrated, the reasons for conferring individual standing in specialty cases and in the instant case are "nearly identical":

[17/] There is no doubt that the United States would consider an attempt by the Government of Mexico (or any other foreign government) to abduct a U.S. citizen from U.S. territory to stand trial in Mexico to be a fundemental breach of both the Extradition Treaty and of its own territorial sovereignty.

> The relevant factors bearing on whether a defendant should have standing are nearly identical in the two cases. Both concern a criminal prosecution. In both cases, the defendant objects to the process by which he has been brought before the court. In both cases the government of the country from which he has been removed has registered its objection — in one instance by a formal protest and in the other by expressly limiting the grant of extradition to trial for specific offenses. Finally, both cases concern rights rooted in an extradition treaty, and as a consequence, both cases touch upon the foreign relations of the United States and the other signatory to that treaty. Whatever concerns for the principle of separation of powers may be implicated in a case such as this one are implicated in precisely the same degree in the specialty cases — where we have long had no difficulty finding that an individual has standing to raise the treaty violation.

Verdugo-Urquidez, 939 F.2d at 1355-56.

Finally, the Government contends that individuals have no standing to enforce the Extradition Treaty because extradition treaties are agreements between nations only and are designed solely to create a framework for suppressing and punishing crime. Pet. Brief, at 34-35. This contention, too, is without merit. The Government ignores the undisputed case law, including *Rauscher*, *Ford* and *Cook*, holding that many treaties, including extradition treaties, provide an exception to the general rule that treaties are concluded solely for the benefit of the contracting states.[18/]

[18/] The *Head Money Cases*, 112 U.S. 580 (1884), *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and *Dreyfus* v. *Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976), cited by the (continued...)

Moreover, as the Court of Appeals recognized, extradition treaties establish procedural requirements that serve to safeguard *both* the sovereign interests of the state parties and individuals subject to extradition. *Verdugo-Urquidez*, 939 F.2d at 1350 ("The requirements extradition treaties impose constitute a means of ... ensuring the fair treatment of individuals."); *see Rauscher*, *Ford*, and *Cook*.[19/]

18/(...continued)
Government, are not to the contrary. The Government relies on this Court's language in the *Head Money Cases* that treaties are primarily for the benefit of the contracting states. The Government ignores, however, the Court's finding in *the same case*, 112 U.S. at 598, that:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the Nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.

The Government also relies on *Argentine Republic* v. *Amerada Hess Shipping Corp.* for the proposition that "these conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action." 488 U.S. at 442. Again, the Government ignores the reality that, although some treaties, such as the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention do not create individual rights, others, including the Extradition Treaty, plainly do. Finally, *Dreyfus* v. *Von Finck*, held only that treaties that do not intend private rights of action will not be construed to provide them. As shown above, the law is clear that extradition treaties are intended to confer individual standing to enforce them.

19/ Where a treaty protects a particular class of persons (in this case, individuals in general and nationals of Mexico in particular), it is logical that those persons should have standing to enforce the treaty. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

This purpose is manifest in many of the provisions in the Extradition Treaty that are clearly designed to protect individual rights and thus confer enforceable private rights.[20] Article IX of the Extradition Treaty provides:

> Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

As the Court of Appeals correctly found, Article IX serves a dual purpose. It establishes the right of the contracting state parties not to have formally to surrender their nationals. It also protects the rights of individuals subjected to extradition to appeal to the Government in whose territory they reside that they not be extradited based on considerations of the individual's interests, including: 1) that a person should be tried by his or her peers; 2) that a state owes a duty of protection to its citizens; 3) that a citizen has a right to stay undisturbed in his or her homeland; and 4) that juries might exhibit bias toward a foreign defendant. *See* J. W. Garner, "Non-Extradition of American Citizens - The Neidecker Case," 30 *Am. J. Int'l L.* 480 (1936).

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[20] It should also be noted that the Extradition Treaty contains no language that would indicate an intent to *preclude* the enforcement of the Treaty by an individual. For example, the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. No. 8302, expressly provides, with specific and enumerated exceptions, that the treaty "shall not give rise on the part of any person of the right to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests" pursuant to the treaty. Presumably, had the United States Government wished to preclude the creation of individual rights under the Extradition Treaty, it would have insisted on the inclusion of similar language.

Article X of the Extradition Treaty sets forth in detail the requirements for a proper extradition request, which constitute additional grounds for an individual's challenge to extradition, both formal and "informal." *See Verdugo-Urquidez*, 939 F.2d at 1351. Similarly, as cases like *Rauscher* make clear, the rule of specialty contained in Article XVII protects individual rights and provides individuals with standing to challenge prosecutions for non-extraditable offenses. Finally, as noted above, Article V of Extradition Treaty prevents extradition for "political" offenses and "purely military" offenses; and Article VIII permits the requested state to refuse extradition absent assurances that the death penalty will not be imposed. These provisions, too, reflect an intention to protect individuals.

In sum, the Extradition Treaty is intended to protect the rights of individuals and must confer standing on individuals to enforce violations of the Treaty. Surely, an individual who has been abducted by the United States should have standing to assert that the abduction is a complete denial of *all* of his rights protected by the Extradition Treaty.

B. The Government of Mexico's Diplomatic Protests Which Unambiguously Objected To Respondent's Abduction As A Violation of the Extradition Treaty Makes It Clear That Mexico Has Not Consented to The Abduction

The Government of Mexico has unequivocally protested the United States' violation of the Extradition Treaty and "has at all times demanded [his] immediate repatriation to Mexico." *Alvarez-Machain*, 946 F.2d at 1467. The Court of Appeals, in *Verdugo-Urquidez*, held that Mexico's diplomatic protests to Respondent's abduction vested Respondent with "derivative

standing" to challenge the district court's jurisdiction over him based on the United States' alleged violation of the Extradition Treaty. 939 F.2d at 1356-57. *See Alvarez-Machain*, 946 F.2d at 1467.[21/]

Although respondent has standing to assert the Extradition Treaty violations with or without Mexico's protest, some cases appear to require that the offended state protest the treaty violation as a prerequisite to individual standing to assert the treaty violation. The reason for this requirement is that, because it is the state party who is initially injured when the other state party violates a treaty, some courts have had difficulty permitting individuals to assert a right under a treaty where the state party to that treaty has indicated either directly or indirectly that it acquiesces in the violation. These courts have construed the absence of protest by the offended state as a waiver of its rights under the relevant treaty or acquiescence in the treaty violation. *See, e.g., Matta-Ballesteros* v. *Henman*, 896 F.2d 255 (7th Cir.), *cert. denied* 111 S.Ct. 209 (1990); *Jaffe* v. *Smith*, 825 F.2d 304 (11th Cir. 1987); *United States* v. *Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (*per curiam*), *cert. denied*, 479 U.S. 1009 (1986); *United States* v. *Zabaneh*, 837 F.2d 1249, 1251 (5th Cir. 1988).

Mexico's unequivocal protests, however, demonstrate that Mexico has not acquiesced in respondent's abduction in violation of the Extradition Treaty. Thus, under the relevant case law, there

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[21/] The Government contends that Mexico's protest is "irrelevant to the issue of respondent's standing" because the Extradition Treaty contains no express language entitling an individual to assert a treaty violation. Pet. Brief, at 35-36. As discussed above, respondent has standing to assert the United States' violation of the Extradition Treaty even though the Treaty does not expressly authorize him to do so.

is no doubt whatever that Respondent has standing to raise the United States' violation of the Extradition Treaty.

Consequently, the Court of Appeals decision that Respondent has standing to assert the United States' violation of the Extradition Treaty as a defense to the district court's jurisdiction over him should be affirmed.

CONCLUSION

On the basis of the foregoing and on the basis of Respondent's Brief, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 5, 1992

Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-712

**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR AMICUS CURIAE AND REAL PARTY IN INTEREST RENE MARTIN VERDUGO-URQUIDEZ

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QUESTION PRESENTED

1. Whether the transborder kidnapping from Mexico of two Mexican nationals by United States agents, which action violates the laws of Mexico and the existing extradition treaty with Mexico, mandates repatriation of the victims upon the repeated and unequivocal demands of Mexico.

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No. 91-712

**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR AMICUS CURIAE AND REAL PARTY IN INTEREST RENE MARTIN VERDUGO-URQUIDEZ

INTEREST OF AMICUS CURIAE

RENE VERDUGO-URQUIDEZ is the Respondent in Case No. 91-670, Petition for Certiorari pending. In January of 1986, he was kidnapped from Mexicali, Baja California, Mexico by paid agents of the U.S. in violation of the

U.S.-Mexico extradition treaty. Mexico objected to his kidnapping. The Court's decision in the instant case will directly affect the authority of the Bureau of Prisons to confine him and the U.S. District Courts to enter and/or enforce an invalid judgment of criminal conviction against him.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 946 F.2d 1466. The decision of the District Court is reported at 745 F.Supp. 599. The decision of the Court of Appeals was founded on the authority of U.S. v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), Petition for Certiorari pending, No. 91-670. The opinion of the District Court with respect to Amicus Curiae's rights under the Extradition Treaty,is unreported.

JURISDICTION

The jurisdiction of this Court to decide whether Article III Courts possess personal and subject matter jurisdiction over Respondent and Amicus Curiae rests on Title 28, U.S.C. section 1254(1). Respondent and Amicus Curiae have consistently asserted that the District Court lacked jurisdiction to proceed with criminal actions.

TREATY INVOLVED

The Extradition Treaty between the U.S. and the United Mexican States, which entered into force on May 4, 1978, is located at 31 U.S.T. 5059, T.I.A.S. No. 9656, and is reprinted in the Joint Appendix at pages 72-87.

STATEMENT OF THE CASE

Amicus Curiae would join in the Statement of the Case filed by Respondent ALVAREZ-MACHAIN with respect

to the circumstances concerning his appearance before the District Court.

At an evidentiary hearing, Amicus Curiae would show that from as early as April, 1985 through January 24, 1986, U.S. law enforcement officers formulated a plan to unlawfully kidnap Respondent and others from the Republic of Mexico in connection with Operation Leyende, the official investigation into the disappearance and death of DEA Special Agent Enrique Camarena-Salazar.

U.S. law enforcement officers and Department of Justice officials discussed among themselves their unilateral conclusion that the formal extradition of Mr. VERDUGO from the Republic of Mexico pursuant to the long-standing Extradition Treaty entered into between the two countries would not be successful. These persons neither consulted with appropriate Mexican

officials or considered a request for the provisional arrest of VERDUGO pursuant to the Treaty. Intentionally and deliberately determining that they would not make a request for the extradition of Respondent, U.S. law enforcement officials contacted a group of men, (some corrupt, local Mexican police officers), who had previously performed kidnappings. These men did not seek to enforce any Mexican laws but rather were acting solely for their own pecuniary interests. The U.S. agents then masterminded the kidnapping and transportation of VERDUGO to the U.S. It is believed that $50,000 was given to these six men in advance of their actions. Additionally, promises of the payment of another $50,000 when the job was finished were made.

On January 24, 1986, while driving his vehicle on a street in San Felipe,

Baja California, Mexico, Mr. VERDUGO was forced to stop his vehicle by the six plain-clothed individuals, who were driving two unmarked vehicles.

Without identifying themselves, these individuals forcibly opened the door to Mr. VERDUGO's car and physically removed him. He was then forced into the rear seat of one of the two cars driven by the six individuals and was forcibly handcuffed, his hands twisted behind his back. One of the six men placed a blindfold on Mr. VERDUGO's head and forced his head down below the windows of the car. At some point, a jacket was placed over Mr. VERDUGO's head. He was held in this position the entire time. He nearly suffocated due to the manner in which he was held captive. During the entire trip, Mr. VERDUGO was in fear for his life.

Two unidentified U.S. law enforcement officials were present at the scene of the stop and supervised the kidnapping. The agents followed the two vehicles as they transported Mr. VERDUGO towards Mexicali. Upon their arrival at the border, Mr. VERDUGO was pushed through a hole in the U.S. border fence just west of Calexico. There, he was taken into custody by U.S. law enforcement officials who were awaiting his forced entrance into the U.S. Shortly thereafter, his residence(s) in Mexico were searched by U.S. and Mexican law enforcement officers without a warrant. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).

After the circumstances of Mr. VERDUGO's abduction were investigated, a Mexican prosecutor issued arrest warrants in the Republic of Mexico charging five of the six individuals

with kidnapping and false imprisonment. These individuals have been admitted into the U.S. Witness Protection Program, where they apparently remain today.

The Republic of Mexico, in its first diplomatic note dated April 23, 1986, (Appendix. A, at pp. 2a), noted that the reports of Mr. VERDUGO's abduction by former Mexican police personnel hired by U.S. authorities, if true, "occurred without the knowledge of the Mexican Federal authorities and are violations of Mexican law and international law."

On August 26, 1987, the Republic of Mexico responded that "it cannot recognize as valid a judicial practice that disregards the procedures established by the extradition treaty currently in force between Mexico and the U.S. The reason for this being that such practice constitutes an

infringement of the constitutional guarantee of due process of law that in cases of deprivation of liberty like this one is recognized by the Political Constitutions of both Mexico and the United States of America." The note further requested the "kind mediation of the Department of State" in "informing the corresponding United States judicial authorities of the position of the Mexican government, so that this case will be properly clarified". (App. B, infra, pp. 4a-7a).

At a hearing held on June 20, 1988, the District Court had denied Amicus Curiae's motion to dismiss the third superseding indictment, which charged five counts of kidnapping, murder, conspiracy, and violent crimes in aid of racketeering due to the manner of his apprehension. The Court declined to hold an evidentiary hearing for the

purposes of establishing the extent of official U.S. involvement in the kidnapping.

After a two month jury trial, Mr. VERDUGO, an innocent man, was convicted on all counts and sentenced to serve four consecutive 60 year terms in addition to a life sentence in the custody of the Attorney General.

The Ninth Circuit ruled that if Amicus Curiae could show at an evidentiary hearing that the U.S. Government was involved in his kidnapping by way of participation or sponsorship, Mexico's protest gave him standing to object to a violation of the Extradition Treaty. The Court of Appeals subsequently found that the aforementioned diplomatic notes constituted a formal protest by the Republic of Mexico into the manner in which the U.S. acquired personal

jurisdiction over Mr. VERDUGO. (939 F.2d at page 1343). Given the violation of the Extradition Treaty which it held had occurred, the proper remedy was to repatriate Mr. VERDUGO to Mexico. (939 F.2d at page 1362).

The Court of Appeals found that the treaty contained, by implication, a proscription against "the abduction of an individual from a foreign country without that State's consent." The Government of Mexico, the state whose sovereignty was violated in this case, has also demanded on the return of Respondent on this ground. (Joint Appendix 67-71).

On November 6, 1991, Mexico sent a third diplomatic note to the Department of State. This note referred to the August 31, 1987 note which it said "explicitly remarked on the illegality of the kidnapping of Mr.

VERDUGO-URQUIDEZ from Mexican territory, and denounced the violation of the Extradition Treaty in force between Mexico and the United States." (App. D, pp. 24a). This note further stated, "The Mexican agents that detained Mr. VERDUGO-URQUIDEZ overstepped their authority, and consequently ... violated Mexican, U.S. and international laws, since the Extradition Treaty forms part of the legislation of both countries." (App. D, pp. 25a). Finally, the note expressly requested the repatriation of Mr. VERDUGO.

SUMMARY OF ARGUMENT

The kidnapping of foreign nationals from their own country presents federal courts from exercising criminal jurisdiction over the victims when (1) an extradition treaty between the offended sovereign and the U.S. is in force; (2) when U.S. agents are

responsible for the kidnapping, either through instigation or ratification; and (3) the offended sovereign objects to the exercise of jurisdiction over the putative criminal defendant.

U.S. v. Rauscher, 119 U.S. 407 (1886), Ford v. U.S., 273 U.S. 593 (1927), and Cook v. U.S., 288 U.S. 102 (1933) all support this conclusion. Petitioner's reliance on Ker v. Illinois, 119 U.S. 436 (1880) and Frisbee v. Collins, 342 U.S. 519 (1952) is misplaced as those cases did not involve treaty violations, U.S. Government responsibility, diplomatic objection to criminal proceedings or Federal courts.

The existence of an extradition treaty with its detailed procedures for rendition, and in the instant case, alternative requirements that the requested country prosecute one of its

nationals if the request is refused, makes no sense whatsoever if the treaty can be ignored at will. Absent the existence of an extradition treaty, countries are under no obligation to surrender persons found within their territory to another nation to stand trial.

Because extradition treaties are self-executing, their terms, express or implied, can be enforced by private individuals, especially once the offended sovereign has registered its belief that a violation has occurred. The only remedy which can redress the affront to the sovereign which occurs in this type of situation is repatriation of the victim.

Finally, this Court is not barred from reaching the merits of the issue by the political question doctrine. Article III clearly extends the judicial

power to treaties, which are the law of the land under the Supremacy Clause. The mere fact that this case "touches upon foreign relations" is not sufficient to render it non-justiciable. This proposition is evidenced from the fact that Ker, Rauscher, Ford, and Cook were all decided upon their merits, notwithstanding that the conduct of foreign affairs was tangentially implicated. Additionally, it was the Government itself which invoked the jurisdiction of the District Court, not the Respondent or Amicus Curiae.

ARGUMENT

I.

KIDNAPPING FOREIGN NATIONALS TO DELIBERATELY BYPASS AN EXISTING EXTRADITION TREATY VIOLATES THE PURPOSE AND SPIRIT OF THE TREATY, THUS BREACHING AN IMPLICIT CONDITION.

In interpreting an international treaty, courts should be mindful that it is in the nature of a contract between nations to which general rules of construction apply. Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522, 533 (1987). A court called upon to interpret a treaty must therefore begin with the text of the treaty and the context in which the written words are used. Air France v. Saks, 470 U.S. 392, 397 (1985). The treaty's history, the negotiations, and the practical construction adopted by the parties may

also be relevant. Choctaw Nation of Indians v. U.S., 318 U.S. 423, 431-432 (1943).

The clear import of treaty language controls unless application of the treaty according to its obvious meaning effects a result inconsistent with the intent or expectations of its signatories. Sumitomo Shoji American Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Maximov v. U.S., 373 U.S. 49, 54 (1963); See also The Amiable Isabella, 6 Wheat 1, 72 (1921).

In construing a treaty, a Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 399 (1985).

In Factor v. Laubenheimer, 290 U.S. 276 (1933), this Court stated:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restrictive construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. (Citations).
>
> Factor v. Laubenheimer, supra, at pages 293-294. See also Jordan v. Tashiro, 278 U.S. 123, 127 (1928).

The history of negotiations, construction of the treaty by a political department of the Government, and diplomatic correspondence may also be of significance in interpreting the terms of a treaty. Factor v. Laubenheimer, supra, at pages 293-294. (See Bacardi Corp. v. Domenech, 311 U.S. 150, 165 fn.12 (1940) (diplomatic

correspondence from Cuba submitted by Solicitor General as relevant to legal position of Government of Cuba concerning treaty interpretation).

Application of these principles of treaty interpretation leads to the inevitable conclusion that the U.S. breached the terms of the Extradition Treaty by conceiving, initiating and participating in the forcible abduction of foreign nationals from Mexican territory.

In U.S. v. Rauscher, 119 U.S. 407 (1886), this Court noted that:

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that

> there was no well-defined obligation of one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and with the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.
>
> * * *
>
> (W)ith nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

U.S. v. Rauscher, supra, at pages 411-412, 414-415. (Emphasis added).

The 1980 Treaty was designed to further closer cooperation "in the fight against crime" (Preamble, Jt.App. at page 72), as well as to protect the sovereignty and territorial integrity of both the U.S. and Mexico.

Article 4(1) delineates the territorial jurisdiction of the signatories. The Treaty provides that access to each country's national territory may only be gained pursuant to the treaty. Article 20(1).

Article 1 of the Extradition Treaty references the obligations of the signatories as "Contracting Parties." The U.S. and Mexico obviously believed that they were entering a valid and binding contract. Such an interpretation is entirely consistent with Article 23(4), setting forth the procedure whereby either Contracting Party may terminate the treaty by simply giving six months notice to the other Party. The U.S. has at no time ever suggested the treaty is not in force or that it intends to terminate the treaty.

The Treaty explicitly establishes the conditions under which either party

may request the surrender of a citizen of a Party from its domestic territory. However, these conditions are limited in the following respects: First, Article 1 compels that all the provisions of the treaty apply to extraditions and restricts the obligation of the requested party to extradite by limiting extradition to offenses committed outside the territory of the requesting party.

Article 2 further delineates the type of offenses for which extradition may be sought. Specifically, Articles 2, 3 (as well as the other Articles to the extradition treaty) repeatedly refer to the obligation by using the term "extradition shall take place" as opposed to other less commanding terms. This suggests these provisions are affirmative, not discretionary.

Articles 5, 6 and 7 specifically set forth circumstances under which extradition shall not be granted. They bar extradition for political offenses, purely military offenses, crimes for which the offender has already been tried, and when prosecution is barred by the statute of limitations. These provisions must be contrasted to Articles 8 and 9 of the treaty, which confer discretion upon the requested party to decline extradition. Under Article 8, when the offense for which extradition is requested is punishable by death under the laws of the requesting party, extradition then "may be refused."

Similarly, Article 9 contains discretionary provisions relating to each party's obligations to deliver its own citizens and its obligation to prosecute its citizens if a request for

extradition is denied. It should be noted that Mexican law prohibits extradition of Mexican citizens.

Article 11 even sets forth a procedure in the case of urgency for the provisional arrest of an accused or convicted person.

Finally, Article 14 provides that the decision of the territorial sovereign whether to extradite its national is final and that the surrender of the person sought is controlled by the laws of the territorial sovereign.

The detailed nature of the procedures set forth in the Treaty, the existence of discretion to decline to surrender nationals for extradition, the provision for finality of decisions, the creation of procedures for communicating the refusal to extradite, and the clear import of the language of the treaty is that the specified procedures limit the

circumstances under which a foreign national shall be brought from the territory of one contracting party into the jurisdiction of the other. This is in accordance with the lack of any duty to extradite in the absence of a treaty. This comprehensive framework was clearly intended by the parties to delineate the exclusive circumstances under which the surrender of suspects could occur.

A contrary interpretation would render certain provisions of the treaty completely meaningless. To the extent that Article 9 confers discretion to a requested Party to refuse extradition of its nationals, the U.S. could override the decision explicitly committed to Mexico's discretion by simply violating its sovereign territory and kidnapping the suspects as it did in these cases.

The procedures set forth throughout the treaty would be completely gutted.

The U.S. fully recognized the import of such a treaty provision. In the Presidential Message accompanying the treaty, President Carter stated that:

> The new U.S.-Mexico treaty would permit the U.S. to extradite its own citizens, as does the old treaty. Mexican law, however, prohibits the extradition of Mexican nationals. The treaty thus obliges the requested state, <u>if it does not extradite its own nationals, to submit the case to its competent authorities for a decision as to prosecution, provided that state has jurisdiction over the offense</u>.
>
> Presidential Message, Extradition Treaty Between the U.S. and Mexico-Changes in the New Treaty at 19 (emphasis added).

Although forcible abductions violate the terms of the treaty, there is nothing to prevent a nation from surrendering a fugitive as a matter of comity in the absence of a treaty. (<u>See U.S. v. Kauffman</u>, 858 F.2d 994, 1008 (5th Cir. 1988) (citing <u>Fiocconi v.</u>

Attorney General of U.S., 462 F.2d 475 (2d Cir. 1972), cert. denied, 409 U.S. 1059 (1972).

The aforementioned construction of the treaty is entirely consistent with the history of extradition treaties in effect since the 1800's. Apparently as early as 1881, it was contemplated that the extradition treaty between the U.S. and Mexico was intended to prevent the unconsented abduction of nationals from a foreign country. Letter of Secretary of State James Blaine to O.R. Roberts, Governor of Texas (May 3, 1881), in Domestic Letters of the Department of State, 1784-1906 (National Archives Microfilm Publication M40, Rule 93).

In 1887, after Ker v.Illinois had been decided, Secretary of State Bayard reaffirmed the position that Mexico's kidnapping of Francisco Arresures from Texas to stand trial was "obtained" not

in accordance with, but in fraud of existing treaties.

In 1985, Abraham Sofaer, then the legal advisor to the State Department, further commented:

> ... Such acts (referring to foreign abductions by U.S. officials) might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations.
>
> Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986).

Based upon the diplomatic notes exchanged between the Republic of Mexico and the Department of State relating to the kidnappings of Mr. VERDUGO and Respondent, it is clear that Mexico believes that the forcible abduction of its nationals from within its borders constitutes a violation of the provisions of the extradition treaty. This view is also consistent with the

exchange of diplomatic notes between the U.S. and Canada wherein Secretary of State George P. Schultz agreed to act to deter "transborder abductions".

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). See also, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

Interpretation of the instant provisions of the extradition treaty in accordance with customary international law also mandates the conclusion that forcible abductions violating the sovereign territory of Mexico violated the provisions of the treaty and customary international law. See

Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), (applying customary international law relating to the Universal Declaration of Human Rights and the American Convention of Human Rights to the due process clause to the U.S. Constitution).

Article 31(3)(c) of the Vienna Convention on the Law of Treaties adopted, May 22, 1969, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 INT"L LEG.MAT. 674 (1969), requires that, in interpreting a treaty, "there shall be taken into account ... any relevant rules of international law applicable in the relations between the parties." The Executive Branch has stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S.Exec.Doc.L, 92d Cong.1st Sess. (1971) at 1.

The international norm is that "a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Restatement (3d) of Foreign Relations Law of the U.S., section 432(2).

The treaty's lack of an express prohibition on state sponsored kidnapping is of no importance, because the parties already believed such action was barred under international norms.

According to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 T.I.A.S. No. 993, Article 2(4), the avoidance of kidnapping a foreign national was one of the focuses of modern extradition treaties. See also Charter of Organization of American States, April 30, 1948, 2 U.S.T. 2394,

2429, T.I.A.S. No. 2361, as amended, Protocol of Buenes Aires, February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, Article 20.

This Court has noted that statutes, wherever possible, must be interpreted consistently with international law. Weinberger v. Rossi, 456 U.S. 25, 32 (1982). (Citing Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804)).

In 1976, Congress specifically prohibited the DEA from taking part in arrests of foreign nationals in the sovereign territory of other governments. 22 U.S.C. section 2291(c). Foreign Assistance Act of 1961 as amended, section 481(c), as enacted by section 504(b) of the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 764 ("Mansfield Amendment"). This action was a specific response to

concerns over DEA activities abroad. Sen. Comm. on For. Rels., Internal Security Assistance And Arms Expert Control Act, Report On S. 2662, S.Rep.No. 605, 94th Cong.,2d Sess. 55 (1976), reprinted in, 1976 U.S. Code Cong. & Admin. News 1378. This statute the aforementioned international law, prohibits the type of actions undertaken by the Government in these cases.

Notwithstanding the foregoing weight of authority, the Government has chosen to ignore its international obligations and to flagrantly disregard the sovereignty of a Government with whom it professes to maintain friendly relations. Simply put, the extradition treaty was violated.

II.
THE TREATY VIOLATION HAS DEPRIVED ARTICLE III COURTS OF ANY JURISDICTION TO HOLD RESPONDENT AND AMICUS CURIAE TO ANSWER FOR CRIMINAL OFFENSES AGAINST THE UNITED STATES.

Restrictions on American seizures which occur incident to American action abroad may be imposed by the political branches through diplomatic understanding, treaty or legislation, even though the Constitution itself may not impose similar restrictions. U.S. v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990). U.S. v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936) ("Operation of the nation in foreign territory must be governed by treaties, international understandings and compacts and the principles of international law"). Accordingly, an extradition treaty may properly limit the circumstances by

which the U.S. may obtain jurisdiction over an individual.

This Court has previously ruled that violations of self-executing treaties can deprive the Court of jurisdiction.

In U.S. v. Rauscher, 119 U.S. 407 (1886), this Court rejected the same arguments presently advanced by the Government, where it held that a person extradited pursuant to the Great Britain/U.S. extradition treaty had standing to object to his prosecution on different charges. Notwithstanding the absence of a provision in the treaty adopting the Rule of Specialty, the court held that the defendant could properly object to his prosecution as a violation of the treaty. The Court specifically noted that the "proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he

was extradited is met by the manifest scope of the treaty itself." Rauscher at page 422.

In Rauscher, this Court explained that:

> It can hardly be supposed that a Government which was under no treaty obligation or any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless the case was made of some specific offense of a character which justified the Government into depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such a person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party.
>
> (The foregoing authorities) all show that (the treaty) is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his

> extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.
>
> U.S. v. Rauscher, supra, at page 422. (Emphasis added).

In Cook v. U.S., 288 U.S. 102 (1933), this Court interpreted the same treaty involved in Ford v. U.S., 273 U.S. 593 (1927), as imposing a limitation upon U.S. seizures of British vessels on the high seas. Cook was the master of the vessel who contested forfeiture proceedings of the cargo and ship. This Court considered the language of the treaty and its history in concluding that Cook had standing to raise violations of the treaty. Although the record does not reflect an official protest by Great Britain, it is evident that prior protests of seizures had occurred and that the treaty was designed to avoid further difficulties.

See U.S. v. Kaufman, 858 F.2d 994, 1008 (5th Cir. 1988) ("Rauscher , which involved an extradition treaty between the U.S. and Britain, was decided against a backdrop of political controversy over precisely whether the treaty contained a rule of specialty").

The Government argued that the illegality of the seizure was immaterial, that the Federal court had jurisdiction and that the claimant by answering waived any rights to object. This Court explicitly rejected these arguments, stating that, "To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty." Id. at pages 121-122.

This application of Rauscher, Cook, and Ford has been consistently applied by the lower courts. U.S. v. Schouweiler, 19 F.2d 387 (S.D. Cal.

1927); U.S. v. Ferris, 19 F.2d 925 (N.D. Cal. 1927) (sustaining pleas to the jurisdiction of the court); and U.S. v. Postal, 589 F.2d 862, 875 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979) ("We read Cook and Ford to stand for the proposition that self-executing treaties may act to deprive the U.S., and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction."); Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931) ("An unlawful arrest is not merely an offense against the peace and dignity of the State; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former."); Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (acknowledging that removal of a foreign national from a

country which is a party to an extradition treaty with the U.S. accomplished by U.S. agents would constitute a violation of the treaty.)

Under Rauscher, Cook, and Ford, this Court clearly lacks jurisdiction over Respondent and Amicus as a result of their seizure in violation of the extradition treaty.

III.
THE KER-FRISBEE DOCTRINE IS INAPPLICABLE TO THE SPECIFIC FACTS OF THIS CASE.

In Ker v. Illinois, 119 U.S. 436 (1886), a U.S. citizen was forcibly returned to the U.S. by private Pinkerton security guards. Ker had fled to Peru after his indictment in Illinois state court on fraud and embezzlement charges. At the time of Ker's abduction, Peru was in fact occupied by the Chilean Army. The private security guard carried an official request for

extradition within the framework of the 1870 extradition treaty between the U.S. and Peru, but the seizure was made outside of formal extradition proceedings. This Court explicitly rejected Ker's claimed "right of asylum" under the treaty, which presupposed that a criminal defendant has the right to insist that procedures under an existing extradition treaty be followed. This Court reasoned that since Peru had the sovereign right to deport Ker if it chose, it similarly had the right to consent explicitly or tacitly to his "informal rendition."

Ker did comment that the treaty did "regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom." Id. at 442.

Ker did not address the present situation in which a signatory to a treaty with the U.S. formally objected to the forcible abduction of one of its nationals from within its borders. Rather, Peru did not object at all.

Petitioner also relies upon Frisbie v. Collins, 342 U.S. 519 (1952). Frisbie involved the forcible kidnapping by Michigan police of a murder suspect living in Illinois. This Court rejected a due process claim based on this forcible abduction and also a claim based on the Federal Kidnapping Act. Frisbie did not deal with claimed treaty violations and thus does not support Petitioner's arguments in any way.

All of the cases cited by Petitioner which rely upon Ker-Frisbee and its progeny, are factually and legally distinguishable from the instant case by one or more of the following factors:

1) The absence of an official protest by the government of the country from which the suspect was abducted, 2) direct involvement or consent of the foreign government in the rendition of the suspect to the U.S.; 3) the absence of direct involvement of the U.S. in the abduction (or the fact that a state, not the federal government, was a party to the criminal proceedings); or 4) the lack of a valid international extradition treaty.

In the past fifty years, there have apparently been only three formal protests filed by foreign sovereigns regarding the circumstances in which an individual has been abducted, namely the instant cases and Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (protest by Canada, but no U.S. involvement in abduction).

See U.S. v. Lira, 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.s. 847 (1975)(Chilean Government voluntarily honored a DEA request); U.S. v. Cordero, 668 F.2d 32 (1st Cir. 1981), (Panama and Venezuela voluntarily deported suspects); U.S. v. Valot, 625 F.2d 308 (9th Cir. 1980), (Thailand voluntarily deported the suspect); U.S. v. Lovato, 520 F.2d 1270 (9th Cir. 1975), cert. denied, 423 U.S. 985 (1975)(defendant was expelled by Mexican officials); U.S. v. Cotten, 471 F.2d 744 (9th Cir. 1973), cert. denied, 411 U.S. 936 (1973)(U.S. citizens voluntarily deported from Vietnam); U.S. v. Hamilton, 460 F.2d 1270 (9th Cir. 1972), (U.S. citizen voluntarily delivered); U.S. v. Herrera, 504 F.2d 859 (5th Cir. 1974), (defendant voluntarily deported by Peruvian authorities); U.S. v. Toro, 840 F.2d 1221 (5th Cir. 1988), (Panamanian

authorities voluntarily turned the defendant over to DEA agents); U.S. v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986), cert. denied 480 U.S. 919 (1987)(defendant turned over pursuant to a Colombian expulsion order); U.S. v. Marzano, 537 F.2d 257 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977)(defendant turned over by Grand Cayman authorities); Wentz v. U.S., 244 F.2d 172, 176 (9th Cir. 1957), (no U.S. involvement in defendant's voluntary rendition to U.S. by Mexican officials); Stevenson v. U.S., 381 F.2d 142 (9th Cir. 1967), (no U.S. involvement in Mexican decision to deport U.S. citizen); U.S. v. ex rel. Lujan V. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975)(absence of an official protest); Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), cert. denied, 111

S.Ct. 209 (1990) (Honduran participation in Matta's arrest); U.S. v. Kaufman, 858 F.2d 994 (5th Cir. 1988), (no evidence that the Mexican Government objected to trial); U.S. v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (Neither Guatamala nor Belize protested Respondent's detention); U.S. v. Evans, 667 F.Supp. 974, 979 (S.D.N.Y. 1987), (no protest by Bermuda); U.S. v. Davis, 767 F.2d 1025 (2d Cir. 1985), (given the absence of any protest from either Switzerland or the U.S. as to a mutual assistance treaty, the defendant had no standing to move to exclude or suppress Swiss bank records on the basis of a purported violation of the treaty.) Ex Parte Lopez, 6 F.Supp 342 (S.D. Tex. 1934) (no U.S. involvement.)

The Frisbie line of cases deals only with abductions of suspects from one state to another. There were no

international treaty obligations at issue under Frisbie. See e.g. Mahon v. Justice, 127 U.S. 700 (1888) (states of the Union have only limited sovereignty and therefore do not have the same sovereign rights to protest the invasion of their territory).

In Ford v. U.S., 273 U.S. 593 (1927), this Court highlighted the critical turning point distinguishing that case and the instant case from Ker , namely, Ker was not decided upon treaty grounds. The Court specifically stated that Ker did not call upon the Court to determine whether the seizure violated the treaty and if so, whether "the power of the Court to hold the defendant for trial" was implicated. Id. at page 606.

Because a treaty violation is at issue, unlike Ker and Frisbee, and also because the U.S.' involvement is

manifest, those cases are simply not applicable to the instant facts. As was the case in Ford v. U.S., supra, this Court should reject the Solicitor General's assertion that Ker v. Illinois governs what is a quite different question.

IV.
THE VICTIM OF THE KIDNAPPING HAS STANDING TO RAISE THE TREATY VIOLATION AS A BAR TO HIS PROSECUTION IN THE OFFENDING COUNTRY.

This Court has long recognized extradition treaties as self-executing regardless of whether the treaty term is implicit (U.S. v. Rauscher, supra) or explicit, or whether it provides a mechanism for domestic enforcement. Valentine v. U.S., 299 U.S. 5 (1936); Johnson v. Browne, 205 U.S. 309 (1907). See Dennis v. Higgins, 111 S.Ct. 865 (1991)(finding implicit rights of individuals under the commerce clause, a

self-executing constitutional limit action on state power).

As early as 1865, the U.S. Government recognized that extradition treaties create more than "rights only between the Governments concerned." Letter from Secretary of State Gresham to German Ambassador. See IV Moore, International Law Digest, 321 (1906).

Some years earlier, this Court in U.S. v. Rauscher, supra, stated that:

> A treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts of the country . . . When rights (of a private citizen or subject under a treaty) are to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.
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> * * *
>
> Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in

every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

* * *

{U}nder the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, "anything in the laws of the states to the contrary notwithstanding," if the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal Government, which has been fully recognized. This remedy is by writ of error from the Supreme Court of the U.S. to the state court which may have committed the error. ... If the party, however, is under arrest and desires a more speedy remedy in order to secure his release, a writ

> of habeas corpus from one of the Federal Judges or Federal Courts, issued on the ground that he is restrained of his liberty in violation of the Constitution or a law or a treaty of the U.S., will bring him before a Federal tribunal, where the truth of that allegation will be inquired into, and, if it be well founded, he will be discharged. ... That is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.
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> U.S. v. Rauscher, supra, at pages 418-419, 421, 430-431. (emphasis added).

In Ford v. United States, 273 U.S. 593 (1927), this Court explicitly recognized that persons seized on the high seas in violation of a treaty between Great Britain and the U.S. may raise the violation of the treaty as a defense. There, the defendants did not enter a plea to the jurisdiction (subsequently abolished by the Federal Rules of Criminal Procedure) and

therefore could not raise it for the first time on appear. See alsoCook v. United States, 288 U.S. 102 (1933) (private party had standing under same treaty).

The purpose of the treaty and objectives of its creators clearly indicate that the treaty, especially Article 9, was intended to confer individual rights enforceable in court, at least as an affirmative bar to jurisdiction. Moreover, because the treaty creates a specific right, a remedy must be implied to protect that right. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (allowing award of damages to redress Fourth Amendment violations); Texas Pacific Railway Co. v. Rigsby, 241 U.S. 33, 40 (1916) ("A civil remedy may be implied for those clearly within the protective

realm of legislation or obligations in the national interest").

Respondent and Amicus have standing to raise the treaty violation as a bar to prosecution in this country by virtue of the fact that they are the direct beneficiaries of the interests protected by the treaty.

In Sierra Club v. Morton, 405 U.S. 727 (1871), this Court stated that:

> Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' (citation) as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Citation).
>
> Sierra Club v. Morton, supra, at pages 732-733.

The doctrine of standing serves both as a constitutional limitation on judicial power deriving from the case in

controversy requirement in Article III for exercise of the federal judicial power, and a self-imposed prudential doctrine intended to monitor judicial review of public acts. The standing inquiry focuses on the party before the court, asking whether he has such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Werth v. Selden, 422 U.S. 490, 498-499 (1975); Baker v. Carr, 369 U.S. 186, 204 (1962). Here, Respondent and Amicus are not invoking federal court jurisdiction, but challenge it by virtue the violation of a treaty which confers certain rights upon them. They are only seeking to justify the exercise of the Court's remedial powers.

In this sense, the term standing is misleading. Nevertheless, Respondent and Amicus have a direct interest against being subject to any criminal proceedings that violate treaty provisions. The fact that Amicus is currently imprisoned in the Federal Penitentiary at Leavenworth, Kansas, and ineligible for parole until the late 21st century (and Respondent being held in lieu of a ten million dollar bond) is a sufficient interest to invoke the Court's remedial powers.

Federal courts have repeatedly held that individuals situated in the same positions as Respondent and Amicus have standing to raise the treaty violation as the result of a clear and unequivocal protest by the offended sovereign. Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990), cert. denied, 111 S.Ct. 209 (1990); U.S. v.

Verdugo-Urquidez, supra, 939 F.2d at page 1355, fn.13 (noting that some circuits no longer require a protest be filed to coffer standing to raise a specialty violation); U.S. v. Cuevas, 847 F.2d 1417, 1427 (9th Cir. 1988), cert. denied, 109 S.Ct. 422 (1989); U.S. v. Zabeneh, 837 F.2d 1249 (5th Cir. 1988).

As the Court stated in U.S. v. Diwan, 864 F.2d 715 (11th Cir. 1989), cert. denied, 109 S.Ct. 3249 (1989):

> In U.S. v. Rauscher, 119 U.S. 407 (1886), the Supreme Court fashioned a remedy for the accused threatened with prosecution for offenses other than those for which extradition had been granted. However, the objective of the rule is to ensure that the treaty is faithfully observed by the contracting party. (Id. at page 430). The extradited individual therefore, can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty.
>
> U.S. v. Diwan, supra, at page 721.

As a result of Mexico's protest, the harm to Respondent, and Amicus and the purpose of the treaty, standing to object to the violation of a self-executing treaty has been conferred. To deny standing would be to totally ignore the purpose and objectives of the treaties' founders. See U.S. ex rel. Donnelly v. Mulligan, 76 F.2d 411, 512-513 (2d Cir 1935) ("A rule of domestic law conferring a judicial remedy on the extraditee can be a rule according him the remedy only if the surrendering Government would object, since the underlying substantive wrong, which grows out of international law, is only to the latter.") Fiocconi v. Attorney General of U.S., 462 F.2d 475 (2d Cir. 1972), cert. denied, 409 U.S. 1059 (1972) ("Justice Gray concurred in the result of Rauscher on the grounds that, in his view, Rev.Stat.

section 5275 (now Title 18 U.S.C. section 3192), providing for the protection of persons delivered by any foreign government, indicated the intention of Congress to vest extradited persons with a judicial remedy for breach of an extradition treaty by the U.S.").

V.
THE INSTANT ISSUE IS NOT A POLITICAL QUESTION.

As this Court itself noted in Baker v. Carr, 369 U.S. 186 (1962), "It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id. at page 211. This Court has stated that an issue is nonjusticiable under the political question doctrine when one of the following circumstances is present:

> (1) 'a textually demonstrable constitutional commitment of the issue to a coordinate political

> department'; (2) 'a lack of judicially discoverable and manageable standards for resolving it'; (3) 'the impossibility of deciding without an initial policy determination of a kind clearly nonjudicial discretion'; (4) 'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government'; (5) 'an unusual need for unquestioning adherence to a political decision already made'; or (6) 'the potentiality of embarrassment from multifarious pronouncements by various departments on one questions.'
>
> INS v. Chadha, 462 U.S. 919, 941, 2779, 77 L.Ed.2d 317 91983) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962).

The Baker Court identified several instances where, although the Executive Branch's dominant role in conducting the foreign affairs of the U.S. was implication, the controversy was subject to judicial action:

> 'Although a court will not ordinarily determine whether a treaty has been terminated, in the absence of conclusive government action, a court may construe a treaty and determine the answer'. Terlinden v. Ames, 184 U.S. 270, 285

(1902); Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 21 U.S. (8 Wheat) 464 , 492-495 (1823); Clark v. Allen, 331 U.S. 503 (1947).

Similarly, a court may act to determine whether a state of belligerency exists abroad to determine the applicability of neutrality statutes when the "executive proclamations" fall short of "a conclusive answer." The Three Friends, 166 U.S. 1, 63, 66 (1897).

Although it is the executive that determines a person's status as a representative of a foreign government, (Ex Parte Hitz, 111 U.S. 766 (1884)), the executives' statements will be construed where necessary to determine the court's jurisdiction. In re Baiz, 135 U.S. 403 (1890).

Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizures of vessels owned by friendly foreign governments. Compare Ex Parte Peru, 318 U.S. 578 (1943) with Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945).

Baker v. Carr, supra, at pages 211-213.

Properly understood, the political question doctrine restrains courts from reviewing an exercise in foreign policy

judgment by the coordinate political branch to which authority to make that judgment has been constitutionally committed. Goldwater v. Carter, 444 U.S. 996, 1006 (1979) (Brennan, J., dissenting from grant of certiorari and dismissal of case.) This case presents no such instance.

In Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974), the Court noted that:

> ... subject to judicial determination of the applicability of the existing treaty obligations of the U.S. to the facts of a given case, extradition is ordinarily a matter within the exclusive purview of the executive.
>
> Shapiro v. Secretary of State, supra, at page 531.

Courts presiding over extradition cases are routinely called upon to determine the existence of subject matter and personal jurisdiction as well as the existence of a valid treaty.

Courts are also called upon to interpret the terms of the treaty. Emani v. District Court, 834 F.2d 1444, 1447 (9th Cir. 1987); Theron v. U.S. Marshal, 832 F.2d 492, 495 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988).

Under Article III, the courts clearly have textual authority to construe treaties and fashion remedies to enforce rights, Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230 (1986); Bivens v. Six Unknown Named Agents, supra, 403 U.S. at page 392. Furthermore, it is beyond dispute that it is the province of the judiciary to say what is the law. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

All that this Court is required to do in this case is determine which of the contracting parties' interpretations of the treaty is more consistent with

the purpose and objectives of the treaty and the long-standing norms of international law which of necessity, govern the relations between the U.S. and Mexico. As Respondent ably points out, the Government, not Respondent or Amicus, has invoked the jurisdiction of this Court by filing criminal charges and orchestrating kidnappings from Mexico to enforce the narcotics laws. It then asks this Court to turn a blind eye towards its actions, in effect giving it carte blanche to act around the world as it sees fit without <u>any</u> accountability. This Court is the final arbiter of the legality of Government action and has the clear authority to determine whether a treaty, as the supreme law of the land, has been violated as the result of the Executive's failure to faithfully execute the laws.

See The Paquete Havana, 175 U.S. 677 (1900), (holding that the seizure of fishing vessels in violation of customary international law was found to be justiciable in U.S. courts)

CONCLUSION

"For better or worse, we live in a world of nation-states," in which our Government must honor the letter and spirit of its freely negotiated international compacts and obligations. U.S. v. Verdugo-Urquidez, 494 U.S. at page 275. Repatriation of Respondent and Amicus will serve this important interest.

Amicus Curiae VERDUGO respectfully requests that the decisions of the U.S. Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

GOLDBERG, FRANT & HALL

PATRICK Q. HALL
March 4, 1992

CHARLES L. GOLDBERG
March 4, 1992

CERTIFICATE OF SERVICE

I, RONALD M. FRANT, hereby certify that I am a member of the Bar of the United States Supreme Court and that on March 5, 1992, I caused forty copies of the revised Brief of Amicus Curiae RENE MARTIN VERDUGO-URQUIDEZ in Support of Respondent HUMBERTO ALVAREZ-MACHAIN to be mailed first class to the Clerk of the United States Supreme Court. I also certify that I served in identical fashion three copies of the aforementioned document upon the Office of the Solicitor General of the United States, Department of Justice, Washington D.C. 20530 and three copies upon Paul L. Hoffman, Counsel of Record for Respondent HUMBERTO ALVAREZ-MACHAIN by mailing them to the ACLU Foundation of Southern California, 1616 Beverly Boulevard, Los Angeles, California 90026.

RONALD M. FRANT

AMICUS.BRF/VERDUGO

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

[redacted] ALVAREZ-MACHAIN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE
[redacted]
IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-712

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Pursuant to Rule 37 of the Rules of this Court, the United Mexican States (Mexico) respectfully submits this brief as *amicus curiae* in support of affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit of October 18, 1991. By letters lodged with the Clerk of the Court, the petitioner and the respondent have consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

The respondent, Humberto Alvarez-Machain, is a national of Mexico. Until his abduction from Mexican territory, arranged by United States law enforcement officers, he was a resident of Mexico. Respondent was forcibly brought to Los Angeles where he was charged in federal

court with complicity in the kidnapping and murder of a DEA agent in Mexico.

On this writ of certiorari, the Court will necessarily consider whether respondent's forcible removal from Mexican territory was in contravention of the existing extradition treaty with Mexico and of general principles of international law, mandating respondent's return to Mexico.

Mexico regards respondent's abduction from Mexican territory as a deliberate disregard by the United States of its obligations under the extradition treaty. Respondent's abduction by agents of the United States is incompatible with established principles of international law and with express undertakings by the United States in recent bilateral and multilateral agreements on mutual legal assistance in penal matters and on cooperation in combatting narcotics trafficking that were in force between Mexico and the United States at the time of respondent's abduction. Under general international law, and under these specific agreements, the United States is obligated to respect Mexico's sovereignty and territorial integrity and not to perform functions of authority in Mexican territory.

Mexico repeatedly protested to the United States government the treaty violations and the attendant infringement of its territorial integrity, and it requested respondent's return to Mexico. Its diplomatic protests and its request for respondent's repatriation have gone unanswered.

The United States' disregard of its commitments to Mexico undermines the rule of law in international relations to which both States are strongly committed. Mexico has a manifest interest in ensuring that treaties to which it and the United States are parties are interpreted and applied by United States courts consistently with the treaty's text, history, object and purpose.

STATEMENT

1. The Mexican Government's Protests

The respondent challenged the district court's jurisdiction to try him on the ground that his forcible abduction from his homeland by officials of the United States violated the Mexico/United States extradition treaty.[1] (Pet. App. 4a).

Mexico repeatedly protested respondent's abduction through diplomatic channels. Mexico's first note to the United States Department of State of April 18, 1990 (J.A. 33), sought information on the participation of United States officials in the abduction of respondent. The note placed the Department of State on notice that "if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered." (*Ibid.*).

One month later, on May 16, 1990 (J.A. 35), Mexico informed the Department of State that "[t]he Government of Mexico considers the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries." The note informed the Department that criminal proceedings had been instituted in Mexico against the abductors for the offenses of kidnapping, false imprisonment and criminal association, and that the Mexican government would seek the abductors' extradition. The note requested that the Department of State "interven[e] before the corresponding authorities so that Dr. Humberto Alvarez Machain be returned back to

---

[1] Extradition Treaty between the United States of America and the United Mexican States with Appendix, done in Mexico May 4, 1978, entered into force January 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on December 9, 1980, pursuant to Article 102 of the Charter of the United Nations; reprinted in J.A. 72-87.

Mexico in order to be investigated regarding his probable participation in the crimes whose investigation and prosecution correspond to [*sic*] the Mexican Government." The note concluded with a request for assistance "in order that . . . [the respondent] be tried and sentenced in Mexico with absolute respect to the Mexican laws in connection with the crimes in which . . . [the respondent] has participated." (J.A. 36).

Thereafter, on July 19, 1990, the Embassy of Mexico presented two notes to the Department of State (J.A. 39, 53), and transmitted two extradition requests from the Attorney General of Mexico for the provisional arrest and extradition of the two individuals who were principally responsible for respondent's abduction from Mexico—a DEA agent, and a Mexican national who had been granted refuge in the United States. The United States did not respond to these notes.

On appeal, following the dismissal of the indictment by the district court, the Mexican Consul General in Los Angeles was instructed by the Ministry of Foreign Affairs to present a letter to the court of appeals setting forth Mexico's position with respect to the treaty, its violation by the United States, and the manner in which the treaty regulates the extradition of Mexican nationals from Mexico. (J.A. 67). The letter stated in relevant part:

> 8. The Treaty constitutes the exclusive and sole means by which the Government of the United States can seek to bring a Mexican national present in Mexico to justice. Mexican legislation in force and effect makes it illegal for Mexican government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement, either with the United States or with any other country, to surrender its own nationals.
>
> In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably

> and expressly reserved to the parties the right to refuse the requested extradition to [*sic*] one of their own respective nationals, agreeing instead to prosecute them in their own national courts, in the interest of justice.
>
> 9. The purpose and object of the Treaty, was from its inception, precisely to provide the legal framework, with which one of the parties could request of the other the extradition of persons from the territory of the former to the territory of the latter. The Treaty is binding on its parties, but serves no purpose if the parties are free to ignore its terms.
>
> 10. The only legal means by which the United States could have pursued the prosecution of DR. HUMBERTO ALVAREZ MACHAIN, a Mexican national, was through the specific provision of the Treaty, which was negotiated, agreed upon and ratified precisely to deal, with the extradition of nationals. . . .

J.A. at 68-69.

2. The United States' Complicity in Respondent's Abduction

After respondent's arraignment, the district court held an evidentiary hearing to determine whether United States law enforcement officers were responsible for respondent's abduction. (Pet. App. 6a). Although the United States denied its complicity in the abduction, the court found that in the evening of April 2, 1990, respondent was seized by five or six armed men in his office in Guadalajara, put by force on a private plane, and flown to El Paso, Texas. There he was met by agents of the DEA and arrested. He was flown to Los Angeles, where he was placed in detention awaiting trial. (Pet. App. 10a-11a).

The district court further found that as of May 1991, the DEA had made partial reward payments of $20,000 to the Mexican individuals who abducted the respondent; that the DEA had evacuated seven of the abductors and their families from Mexico to the United States; that it

paid for their weekly living expenses (*ibid.*); that respondent's abduction did not result from any cooperative effort by Mexico and the United States, or any participation in the abduction by the Mexican officials; and that the United States "unilaterally proceeded with the abduction without the knowledge or participation of the Mexican government." (Pet. App. 33a).

The district court determined as a matter of law that the United States violated the Mexico/United States extradition treaty, and that "[u]nder these circumstances, the Court lacks jurisdiction to try this defendant. Accordingly, the defendant is ordered discharged and the government is ordered to repatriate the defendant to Mexico forthwith." (Pet. App. 4a-5a).

On appeal, the United States did not challenge the district court's findings regarding its instigation and complicity in respondent's abduction. The court of appeals affirmed *per curiam* (Pet. App. 1a), relying on its exhaustive treatment of the abduction issue in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *cert. pending*, No. 91-670, decided three months earlier. The court below concluded:

> The Government of Mexico has stated unequivocally that the abduction of Dr. Alvarez-Machain by United States agents violated the 1980 Extradition Treaty and general principles of international law and has at all times demanded his immediate repatriation to Mexico. Moreover, the Mexican government has stated its position on these issues unequivocally to the court in this case . . . . Thus, there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation. . . . The *Verdugo* case requires the dismissal of the indictment and the repatriation of the appellee. [Pet. App. at 3a].

(Pet. App. at 3a). The United States seeks reversal in this Court. It maintains that respondent's abduction was in the nature of an "extraterritorial arrest," and is not inconsistent with the means provided for in the extradition

treaty for obtaining custody of persons from Mexico for trial in United States courts.

SUMMARY OF ARGUMENT

I.

A. The United States' argument that the extradition treaty does not address abductions of Mexican nationals from Mexican territory, and that such "extraterritorial arrests" are conducted "outside the extradition context" (Pet. Br. 9), does not withstand analysis. The treaty, like all international accords, must be interpreted against the background of relevant rules of international law applicable to the relations between the parties. Of particular relevance to the forcible removal of a person by agents of a foreign state are the established international law principles of independence of states, non-intervention in internal affairs, legal equality, and respect for territorial integrity. These principles are the foundation upon which all extradition treaties are constructed. For a state to send its agents to another State to apprehend or abduct that State's nationals for trial elsewhere is incompatible with the established international legal order. There was, therefore, no reason for Mexico to insist that the extradition treaty contain express language that, absent permission from Mexico, the United States could exercise no police powers in the Mexican territory. At no time during the negotiation of the extradition treaty did the United States' negotiators state or suggest that the United States reserved to itself the right to secure the presence of Mexican nationals for trial in the United States "outside the extradition context," and there exists no such reservation to the treaty.

B. Article 9 of the extradition treaty leaves it to the discretion of each State whether to extradite its nationals. During the negotiation of Art. 9, the Mexican negotiators expressly informed the United States negotiators of the restraints that Mexican laws impose on the President of Mexico with respect to the extradition of Mexican nationals. Consequently, the parties included a second para-

graph—similar to one contained in most modern U.S. extradition treaties with civil law countries—to assure that Mexicans whose extradition was denied solely on the basis of nationality would be prosecuted by Mexico.

In this case, the United States did not inquire whether Mexico was prepared to deliver the respondent for trial in the United States, nor did it afford Mexico the opportunity to try the respondent in its own courts. Instead, in disregard of the stipulations of the extradition treaty and its responsibilities under established principles of international law, the United States abducted the respondent from Mexico, brought him without the consent of the Mexican government to the United States for trial, and deprived him of the rights guaranteed to him by the Constitution and laws of Mexico.

C. Mexico and the United States are parties to two recent bilateral treaties on mutual legal assistance and on cooperation in combatting narcotics trafficking, and both States have ratified a multilateral United Nations Convention on the latter subject. Both treaties and the Convention make it explicit that, in rendering assistance to each other and in combatting crime and drug trafficking, the States must carry out their obligations in a manner consistent with the principles of sovereign equality and territorial integrity. The United States' action in abducting the respondent from the territory of Mexico was in total disregard of these solemn treaty commitments.

II.

The *Ker-Frisbie* rule, which holds that an illegal arrest or abduction does not void a subsequent conviction, is a rule of United States domestic law, not a principle of international law, and has been most often applied in the United States in the context of domestic kidnappings, abductions and wrongful arrests.

This Court has never sanctioned the prosecution in a United States court of a foreign national abducted from his home State by officials of the United States, where

an extradition treaty was in force with that foreign State, where the offense was committed in the territory of the foreign State, and where the foreign state protested the abduction.

Ker is no authority for the issue in this case. The rule's namesake, *Frisbie*, and its progeny, deal with domestic interstate abductions and are not relevant to the state-sponsored international abduction which lies at the heart of this case. International law, which this Court has traditionally applied, firmly establishes the principle that absent consent or acquiescence by the territorial State, another State may not send its agents into that State's territory to apprehend persons accused of a crime.

III.

The appropriate remedy for the contravention of the treaty that occurred in this case, and the only remedy that will prevent the recurrence of the violation of Mexico's territorial integrity, is the return of respondent to Mexico. Repatriation of a national who was unlawfully abducted from his home State by agents of a foreign State will signify the courts' unwillingness to countenance lawlessness by its law enforcement agents on foreign soil. Unlike the result which frequently follows from the application of the exclusionary rule in the domestic context, ordering the respondent's repatriation will not immunize him from prosecution, as the United States claims. His return to Mexico will only change the place of trial and the applicable law, since Mexico is committed under the extradition treaty to submit the case to its judicial authorities for investigation and prosecution.

ARGUMENT

I. ABSENT CONSENT BY MEXICO TO A LESS FORMAL RENDITION OF OFFENDERS, THE EXTRADITION TREATY PROVIDES THE SOLE MEANS BY WHICH THE UNITED STATES MAY SECURE AN OFFENDER FROM MEXICO

A. The Treaty Prohibits U.S. Government-Authorized or Sponsored Abductions of Persons From Mexican Territory for Trial in the United States

The thrust of the United States' argument is that the Extradition Treaty "is not a general compact for the protection of territorial rights." (Pet. Br. at 9). Elsewhere, the United States submits that the Extradition Treaty does not prohibit "extraterritorial arrests" by the United States "outside the context of extradition proceedings" (*Id.* at 23), and that "nothing in the treaty speaks to the consequences of an apprehension that is made without a request for extradition." (*Ibid.*). Mexico rejects in the strongest terms the view that the United States authorities may perform "extraterritorial arrests" in Mexico.

As a sovereign state, Mexico alone has the right to determine which authority exercises governmental powers in its territory, and no State may arrogate to itself the right to perform sovereign acts within its borders without its consent. The principles of sovereign equality and territorial integrity of States, the foundation of an enlightened international legal order, are fundamental. The principle was forcefully and unequivocally set forth by this Court, speaking through Chief Justice Marshall, in *The Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116, 136 (1812):

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.

> . . .
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See also Art. 2, para. 4, of the Charter of the United Nations of June 26, 1945,[2] the members of which include Mexico and the United States, which obligates "All Members" to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any State . . . ." Additionally, the Charter of the Organization of American States of April 30, 1948,[3] whose members also include Mexico and the United States, provides in Art. 17 that the "territory of a State is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatsoever." It is within this framework that the Mexico/United States Extradition Treaty must be interpreted.[4]

Extradition is one of the oldest forms of international judicial assistance. Extradition treaties are designed to promote the cooperation between States in criminal matters. They "balance[] the demands of the international le-

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[2] 59 Stat. 1031, T.S. No. 993.

[3] 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, as amended by the Protocol of Buenos Aires of February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

[4] See Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31, *reprinted in* 63 Am.J.Int'l L. 875, 885 (1969):

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. . . .
>
> 3. There shall be taken into account, together with the context: . . . c. *any relevant rules of international law applicable in the relations between the parties.* [Emphasis added.]

gal order that serious crime not go unpunished with concern that persons accused of crime not be subjected to unfair methods of adjudication or punishment." *Restatement (Third) Foreign Relations Law of the United States* §476, comment *a* (1987). Since the beginning of extradition relations between Mexico and the United States one hundred thirty years ago, it has been clearly understood by both States that their extradition treaties were designed, among other things, to protect the sovereignty and territorial integrity of both States. United States Secretary of State Blaine acknowledged this principle well over a century ago when he advised the Governor of Texas that—

> The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and *does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdiction of the other.*

4 Moore, *Digest of International Law* § 603, at 330 (1906), emphasis added.

That the United States regarded the extradition treaty as the exclusive means by which Mexico could secure a person from the United States was also made clear by Secretary of State Bayard in 1887 when a Mexican national was seized in Texas by a Mexican police officer with the aid of local deputy sheriffs and forced across the border to Mexico. Mr. Bayard stated that the wanted person's return to Mexico was "obtained not in accordance with, but in fraud of existing treaties." 2 Moore, *supra* § 204, at 276. Nothing in the negotiating history of the three successive extradition treaties that Mexico entered into with the United States, beginning in 1862,[5] or in the dip-

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[5] The precursors of the current extradition treaty between Mexico and the United States are the treaty of May 20, 1862, 12 Stat. 1199, T.S. No. 209 (terminated January 24, 1899), and the treaty of April 22, 1899, 31 Stat. 1818, T.S. No. 242, with supplements of 1903, 1926 and 1941 (terminated January 25, 1980).

lomatic correspondence between them following the entry into force of these treaties, lends support to the view pressed by the United States that the police authorities of the signatory states may, consistently with the detailed stipulations of an extradition treaty, make "extraterritorial arrests" in the territory of the other "outside the extradition context." (Pet. Br. at 21). The acknowledgement of this extraterritorial right in either Party would have constituted such a radical departure from the very raison d'être of extradition treaties, that it would have excited contemporary comment. No consent to arrests in the territory of the other party is discernible from the text, history or purpose of the treaty. The United States does not, and cannot, point to any source that would support its thesis—a thesis that it announces here for the first time. Had the United States at any time insisted on such a reservation to the treaty, its extradition relations with Mexico would have ended.

B. Respondent's Abduction Has Deprived Him of the Special Safeguards Stipulated in the Treaty for Nationals of the Signatory States

1. Article 9 of the 1978 extradition treaty provides (J.A. at 76):

> **Extradition of Nationals**
>
> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

This Article takes into account the provisions of the Mexican Law on International Extradition[6] which prohibit the extradition of its nationals. The United States fully understood this to be the law of Mexico and agreed in Art. 9 of the treaty that extradition of Mexican nationals was subject to a special regime.

In submitting the treaty to the Senate for its advice and consent, President Carter's message provided an article-by-article analysis prepared by the Department of State,[7] which described the import of Art. 9 thus:

> Article 9 deals with the extradition of nationals. It is similar to provisions in some of our other recently signed extradition treaties. It grants the executive the discretionary power to extradite its own nationals. If extradition is denied on the basis of nationality, the requested Party undertakes to submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense. *This article thus takes into account the law of Mexico prohibiting the extradition of its nationals but allowing for their prosecution in Mexico for offenses committed abroad.* [Emphasis added.]

The United States' brief makes light of the Mexican government's discharge of its domestic legal order when it complains that "to date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States." (Pet. Br. at 21 n. 17). The accompanying sentence in the text is ominous: "[N]othing in our

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[6] Art. 14 of the "Ley de Extradición Internacional" of December 22, 1975, provides:

> No Mexican shall be extradited to a foreign state except in exceptional cases in the discretion of the Executive. (Informal translation.)

[7] Exec. Rep. M, Extradition Treaty with the United Mexican States, 96th Cong., 1st Sess. VI (1979) (Letter of Submittal by Secretary of State Cyrus Vance).

extradition treaty with Mexico affirmatively indicates that a defendant who has been forcibly abducted from that country is immune from prosecution in an American court." (*Id.* at 20.) It then proceeds to justify the abduction by stating: "Yet if respondent is repatriated to Mexico, *he will acquire just such an immunity from prosecution.*" (*Id.* at 20-21, emphasis added). The assertion is demonstrably false.

A Mexican national accused of having committed a crime on Mexican soil does not, by reason of being abducted to a foreign country, become "immune" from prosecution. Along with all citizens and residents, he enjoys the rights guaranteed to him by the Constitution, treaties and laws of Mexico.[8] One of these rights is to be tried by the courts of Mexico for an offense committed in Mexico. The United States' abduction seeks to deny to the respondent that right—a right also guaranteed by Article 9(2) of the extradition treaty.[9] There can, of course, be no question that

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[8] The Mexican Political Constitution provides in relevant part:

> Article 14. . . . No person shall be deprived of life, liberty, property, possessions, or rights without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect prior to the act.
>
> In criminal cases no penalty shall be imposed by mere analogy on convincing rationale but rather must be based on a law which is in precisely applicable to the crime in question. . . .
>
> Article 16. No one shall be disturbed in his person, family, domicile, documents or possessions except by virtue of a written order by the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, unless such arrest or detention is preceded by a charge, accusation, or complaint concerning a specific act punishable by physical punishment, made by a credible party, supported by a sworn affidavit or by other evidence indicating the probable guilt of the accused; . . .

[9] Mexican municipal law makes no distinction between "self-executing" treaties and those that merely constitute a contract between States,

the courts of Mexico are competent and obligated to try the offenses with which the respondent is charged.

The United States-sponsored abduction plainly denied to the respondent the procedural rights guaranteed to him by Articles 14 and 16 of the Mexican Constitution, by Article 3 of the extradition treaty[10] and by Article 16 of the Mexican Extradition Law,[11] to have the inculpating

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as known in United States law.

Article 133 of the Mexican Political Constitution provides:

> This Constitution, the laws of the congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of each State shall conform to the said Constitution, the law, and treaties, notwithstanding any contradictory provisions that may appear in the Constitution or laws of the States.

A treaty that has been approved by the Mexican Senate and proclaimed by the President forms part of the municipal law of Mexico and confers personal rights on individuals that are enforceable in Mexican courts.

[10] Article 3 of the treaty provides in relevant part:

> Evidence Required
>
> Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, . . . to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place. . . .

[11] Article 16 of the Mexican Extradition Law requires that the Mexican authorities be furnished:

> The formal extradition request and the documents on which it is based by the requesting State must include:
>
> I. Specification of the crime for which the extradition is sought.
>
> II. Proof that the crime has been committed and the probable involvement of the accused. If the accused has been convicted by the courts of the requesting state, it will suffice to submit an authenticated copy of the final judgment.

evidence against him reviewed by an impartial Mexican magistrate before he was deprived of his liberty.

The United States' answer to the deprivation of all of these rights is simply that since respondent was not extradited under the treaty, he has no rights. (Pet. Br. at 13). Mexico disagrees. The extradition treaty governs comprehensively the delivery of all persons requested for extradition "for an offense committed within the territory of the requesting Party" (Article 1(1), and, as in this case, for an offense committed inside the territory of the requested party. (Article 1(2).) In consequence, the United States' failure to use the extradition treaty deprived Mexico of its sovereign right to prosecute the respondent in its domestic courts and denied to respondent the rights guaranteed him by the Mexican Constitution, treaties and laws. The frustration and denial of these rights constitute independent material breaches of the treaty.

C. Respondent's Abduction Violated Three Other Recent Accords Between Mexico and the United States

Three other accords presently in force between Mexico and the United States emphasize Mexico's willingness to provide the fullest cooperation in combatting crime and narcotics trafficking, and in providing effective and timely legal assistance to the United States. The United States' brief treats these accords with silence.[12]

III. . . .

IV. A copy of the legal provisions of the requesting State, with regard to the definition of the crime and the punishment, and the corresponding statute of limitations, as well as an authorized statement of the fact that said provisions and statute were in force at the time the crime was committed.

V. The original warrant of arrest which may have been issued against the accused.

[12] The treaties described in the text provide a "relevant rule of [con-

First, the 1987 Treaty of Cooperation for Mutual Legal Assistance[13] expresses in its preamble the commitment of both States "to cooperate in the framework of their friendly relations, and to undertake mutual legal assistance *to provide the best administration of justice in criminal matters.*" (Emphasis added). Thereafter, paragraph 2 of Article 1 of the Treaty sets forth the understanding of both States that—

> This Treaty *does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority* exclusively entrusted to the authorities of that other Party by its national laws or regulations. [Emphasis added.]

Second, the 1989 Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency[14] emphasizes in Article I, that—

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ventional] international law" that governs the relations between Mexico and the United States within the purview of Art. 31(3) of the Vienna Convention on the Law of Treaties, *supra*, n.4.

[13] Treaty of Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, done in Mexico City December 9, 1987, entered into force for the United States May 3, 1991, T.I.A.S. No. ____, *reprinted in* 27 I.L.M. 443 (1988). Article 1 provides as follows:

> SCOPE OF THE TREATY
>
> 1. The Parties shall cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters, in accordance with the terms of this Treaty and subject to the limitations of their respective domestic legal provisions. Such assistance shall deal with the prevention, investigation and prosecution of crimes or any other criminal proceedings arising from acts which are within the competence or jurisdiction of the requesting Party at the time the assistance is requested, and in connection with ancillary proceedings of any other kind related to the criminal acts in question.

[14] Agreement between the United States of America and the United

2. The Parties will fulfill their obligations under this Agreement *in accordance with the principles of self-*

Mexican States on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, done in Mexico City February 23, 1989, entered into force July 30, 1990, T.I.A.S. No. ____ , *reprinted in* 29 I.L.M. 58 (1990). The preamble and Article I state as follows:

> The United States of America and the United Mexican States (the Parties),
>
> Aware of the need to protect the lives and health of their respective peoples from the serious effects of narcotics trafficking and drug dependency,
>
> Agreeing that such conduct should be attacked comprehensively from four major areas: prevention and reduction of the illicit demand for narcotics and psychotherapic substances; control of supply; suppression of illicit traffic; treatment and rehabilitation,
>
> Acknowledging that the various aspect of narcotics trafficking and drug dependency threaten the security and the essential interests of each of the Parties;
>
> Resolved to extend to each other the necessary cooperation to effectively combat narcotics trafficking and drug dependency, given the international scope and nature of these phenomena;
>
> Encouraged by the spirit of the recommendations contained in the Comprehensive and Multidisciplinary Plan of Future Activities in the Control of the Improper Use of Drugs (the Plan) adopted at Vienna, Austria, on June 26, 1987, and
>
> Inspired by the goal that cooperation under this Agreement complement the cooperation that both Parties provide in fulfillment of their international obligations under the United Nations Convention on Illicit Trafficking in Narcotics and Psychotropic Substances (the Convention), adopted at Vienna, on December 20, 1988,
>
> Have agreed as follows:
>
> ARTICLE I
> Scope of the Agreement
>
> 1. The purpose of this Agreement is to promote cooperation between the Parties so that they can combat more efficiently

determination, non-intervention in internal affairs, legal equality, and respect for the territorial integrity of States.

3. *This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority* exclusively entrusted to the authorities of that other Party by its national laws or regulations. [Emphasis added.]

Third, the multilateral 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs, which both Mexico and the United States have ratified,[15] echoes the pro-

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narcotics trafficking and drug dependency, phenomena that transcend the boundaries of both countries.

The Parties shall adopt the necessary measures in fulfillment of the obligations they have entered into under this Agreement, including legislative and administrative measures, in conformity with the fundamental provisions of their respective internal legal systems.

2. The Parties will fulfill their obligations under this Agreement in accordance with the principles of self-determination, non-intervention in internal affairs, legal equality, and respect for the territorial integrity of States.

3. This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations.

[15] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988, entered into force for the United States and for Mexico on November 11, 1990, T.I.A.S. No. ____, *reprinted in* 28 I.L.M. 493 (1989), defines the scope of the Convention as follows:

Article 2

SCOPE OF THE CONVENTION

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances

visions of the two bilateral agreements between Mexico and the United States with respect to the observance of the principles of sovereign equality and territorial integrity by the High Contracting Parties.

These accords establish no new norms for the conduct of States. They codify the established rule of international law prohibiting the authorities of one State from performing police or other enforcement functions in the territory of another State without the express permission of the latter, and the principle that extradition treaties are designed, *inter alia*, to protect the territorial integrity and sovereignty of the Contracting States. (See *supra*, pp. 10-12). The United States conspicuously disregarded these principles, and the reciprocal pledges contained in these international accords when its agents arranged for respondent's forcible removal from Mexico.

II. THE RULE ANNOUNCED IN KER V. ILLINOIS DOES NOT GOVERN THIS CASE

Ker v. Illinois,[16] decided more than a century ago, concerned the prosecution in an Illinois court of an American citizen who was charged with larceny and embezzlement from a Chicago bank. Ker fled to Peru to escape prosecution and was forcibly returned by a private Pinkerton agent to Chicago to stand trial. Although the agent carried an extradition warrant for Ker's arrest which was to be

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having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. *The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.*

3. *A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.* [Emphasis added.]

[16] 119 U.S. 436 (1886).

presented to the local authorities, on his arrival in Lima, the agent found that the city was occupied by military forces of Chile. There apparently was no Peruvian government to which the extradition warrant could be presented.[17] The agent apprehended Ker and brought him forcibly to Chicago where he was tried and convicted. Peru at no time protested Ker's abduction.

The Illinois Supreme Court sustained the conviction and rejected Ker's defenses that the manner in which he had been brought before the court denied him due process of law and that as a result of his presence in Peru he had acquired a "positive right" that he could be removed from that country only under the extradition treaty. *Ker v. Illinois*, 110 Ill. 625 (1884). On writ of error to this Court, Ker again raised both defenses. Speaking for a unanimous Court, Justice Miller rejected the due process argument:

> The "due process of law" here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.

119 U.S. at 440.

The Court dismissed the asylum argument, stating:

> There is no language in this treaty, or in any other treaty made by this country on the subject of extradition of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; . . .

119 U.S. at 442.

As regards the extradition treaty with Peru, the Court observed:

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[17] The additional historical facts, not recorded in the Court's opinion, are taken from Fairman, *Ker v. Illinois Revisited*, 47 Am.J.Int'l L. 678 (1953).

> Julian [the Pinkerton agent], in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, *and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.*

119 U.S. at 443, emphasis added.

Most relevantly to the present case, the Court declined to consider whether this private abduction constituted a violation of international law, leaving final determination of that question to the state courts as a matter of state law:[18]

> The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. . . .
>
> However, this may be, the decision of that question is as much within the province of the State court, as a question of common law, or of the law of the nations, of which that court is bound to take notice, as it is of the courts of the United States. *And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.*

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[18] It was less than three decades ago, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1984), that the Court squarely ruled that international law is *federal* law, and that state courts must follow the federal lead in ascertaining, interpreting and applying that body of law."[R]ules of international law should not be left to divergent and perhaps parochial state interpretations." *Id.* at 425.

119 U.S. at 444, emphasis added.

The distinctions between the factual and legal underpinnings of *Ker* and the instant case are palpable and striking:

- In 1886, the legal protections afforded to individuals throughout the civilized world today and the emerging international law of human rights did not exist.
- Ker's abduction by a private agent was "without any pretense of authority . . . from the government of the United States." 119 U.S. at 443; here, the Court is faced with an abduction sponsored and financed by the United States and carried out by agents of the United States in the performance of their official functions.
- Ker, unlike the respondent, was a United States citizen who, under established doctrine, cannot invoke international law against his own sovereign, but must be satisfied with such protections as the Constitution and laws of the United States may afford to him; respondent is not so limited.
- Ker, unlike respondent, was charged with offenses which he committed solely in this country and he became a "fugitive from justice" in the dictionary sense of the term when he fled from the United States; respondent is charged with no offense committed in the United States and he did not flee to escape prosecution, nor did he seek asylum elsewhere.[19]
- It is subject to doubt whether the extradition treaty between the United States and Peru was in force at the time of Ker's abduction, in light of the political instability in Peru when Ker was abducted; no such doubt exists here.

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[19] Aside from the provisions of the extradition treaty, under international law Mexico has the primary right to place him on trial, both under principles of territoriality and nationality.

- *Ker* was a state prosecution in the 19th century, not a federal prosecution conducted in the last decade of this century.

- Peru at no time protested Ker's abduction through channels of diplomacy or by appearance in the United States courts, either at trial or on appeal.

It would be presumptuous for Mexico to comment whether the rule formulated by this Court in *Ker* should retain its vitality in the purely domestic context, as reaffirmed in *Frisbie v. Collins*, 342 U.S. 519 (1952). Mexico submits that the court below was correct in its discriminating analysis and in declining to apply the *Ker* rule mechanically in an international abduction case, as the United States urges. (Pet. Br. at 11-17). Blind adherence to doctrines formulated in another era, and disregard of international agreements to combat crime, will not further international efforts to bring criminals to justice.

It is true that numerous lower federal courts have struggled in recent years with various aspects of forcible seizure of suspects abroad in disregard of extradition treaties, and that they have felt bound by this Court's pronouncement in *Ker*. Their decisions are, nevertheless, distinguishable from the facts here because of such factors as non-involvement by agents of the United States in the forcible removal of the suspect from foreign territory;[20] rendition of the suspects, or active assistance in their rendition to the United States, by the authorities of the territorial sovereign;[21] seizures of suspects in international waters,[22] or the tacit condonation of the abduction by the sovereign in whose territory the abduction occurred.[23]

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[20] *E.g.*, *United States v. Lira*, 515 F.2d 68, 70-71 (2d Cir. 1975).

[21] *E.g.*, *United States v. Toro*, 840 F.2d 1221, 1229 (5th Cir. 1988); *see also Verdugo-Urquidez*, *supra*, 939 F.2d at 1353 n. 12 (citing cases).

[22] *E.g.*, *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

[23] *E.g.*, *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir.), *cert. denied*, ___ U.S. ___ (1990); *see also Verdugo-Urquidez*, *supra*, 939 F.2d at 1349 n. 9 and 1353 n. 12. (citing cases).

The United States pleads with the Court to reaffirm the *Ker* rule in this case for the reason that "immunizing a defendant from *all* prosecution is too high a price to pay for an illegal arrest." (Br. at 17; emphasis added). As Mexico pointed out earlier, the plea's premise is both false and disingenuous. Mexico does not appear in this Court in support of "immunizing" the respondent from prosecution;[24] it respectfully asks the Court to recognize and enforce its right to try the respondent in its courts—a right which the United States acknowledged and agreed to in the extradition treaty, but which the United States seeks to deny to Mexico in this case.

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[24] Mexican authorities commenced a criminal investigation in 1985 into the kidnaping and murder of DEA agent Enrique Camarena Salazar and Alfredo Zavala Avelar. Warrants of arrest were issued for Rafael Caro Quintero, Ernesto Fonseca Carrillo, and others in the state of Jalisco (Guadalajara) on charges of illegal deprivation of freedom in the form of abduction, homicide, and various narcotics offenses. They were charged with the offenses named on September 19, 1989, and were tried and convicted on December 12, 1989. The court imposed the maximum penalty on both defendants, *viz.*, 40 years imprisonment, various fines and forfeiture of properties. The convictions were affirmed on appeal on August 10, 1990, by the Third District Criminal Court of the State of Jalisco. Nine of their principal associates were also convicted and sentenced for their complicity in the offenses.

In addition, Caro Quintero, Fonseca Carrillo and twenty-one of their associates were convicted and sentenced in the Federal District (Mexico City) for narcotics offenses, firearms offenses, criminal association and illegal deprivation of freedom offenses. In that case, Caro Quintero was sentenced to a separate 34-year prison term and Fonseca Carrillo was sentenced to a separate 11-1/2 year term. Their twenty-one associates received sentences ranging from 12-1/2 to 14-1/4 years, plus fines and forfeitures.

A third person, believed to be a principal in the Camarena case, Miguel Angel Félix Gallardo, has also been arrested and is being tried, together with nine of his associates in the Federal District (Mexico City) on various narcotics trafficking, firearms and bribery charges. They have been in custody since April 1989.

III. INTERNATIONAL LAW MANDATES THAT RESPONDENT BE RETURNED TO MEXICO

This Court has uniformly recognized that prosecutions in American courts of violations of treaties and international law require the restoration of the status quo ante, and the release of persons or property prosecuted or seized in violation of the international commitments of the United States. *See e.g., United States v. Rauscher*, 119 U.S. 407 (1886) (prosecution in violation of extradition treaty); *Cook v. United States*, 288 U.S. 102 (1933) (seizure of property in violation of Convention to Prevent Smuggling); *Ford v. United States*, 273 U.S. 593 (1927) (same); *The Paquete Habana*, 175 U.S. 677 (1900) (condemnation of fishing vessels as price of war in violation of international law); *Cosgrove v. Winney*, 174 U.S. 64 (1899) (prosecution for an offense committed prior to extradition). The court below was correct in relying on these decisions in formulating its order that the respondent be allowed to return to Mexico.

In its Judgment (indemnity phase) in the *Chorzów Factory* case (Germany v. Poland), 1928 P.C.I.J., ser. A, No. 17, at 4, 47, the Permanent Court of International Justice ruled that restitution is the foremost remedy for international wrongful acts:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.* [Emphasis added.]

Among the ambitious studies in international law conducted under the auspices of Harvard University between the two world wars, the results of which were formulated in the form of "draft conventions," was a proposed convention on "Jurisdiction with Respect to Crime". 29

Am.J.Int'l L.Supp. 435 (1935).[25] The scholars who participated in this project agreed that the following rule comprised a fair statement of customary international law with respect to transborder abductions that violate treaties:

> Article 16. *Apprehension in Violation of International Law*
>
> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

29 Am.J.Int'l L.Supp. at 623.

In commenting on the rule, the project stated: "It is everywhere agreed of course, that 'recourse to measures in violation of international law or international convention' in obtaining custody of a person charged with a crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise'." *Id.* at 623-24. Writers and publicists on international law are near unanimous that the appropriate municipal law remedy for the United States' violation of the extradition treaty is respondent's discharge from the custody of the courts and his return to Mexico.

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[25] The Reporter and the Assistant Reporter of the project were Prof. Edwin D. Dickinson and Prof. William W. Bishop, Jr., respectively.

The advisory panel on the project consisted of a veritable Who's Who of American international law scholars and practitioners at the time: Judge Learned Hand; George W. Wickersham, former Attorney General of the United States; Elihu Root, former Secretary of State; Manley O. Hudson, former judge of the Permanent Court of International Justice and a member of the Permanent Court of Arbitration; Green H. Hackworth, Legal Adviser of the Department of State; Charles Chaney Hyde and James Brown Scott, former Solicitors of the Department of State; Philip C. Jessup, a future American judge on the International Court of Justice.

A former President of the Permanent Court of International Justice, and one of the most distinguished scholars on international law in the English-speaking world, Hersh Lauterpacht, stated:

> "The duty to respect the territorial supremacy of a foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. A State must not perform acts of sovereignty in the territory of another State."

1 *Oppenheim's International Law* 295 (Lauterpacht ed., 8th ed. 1955). To illustrate such an international delinquency, and the remedy therefore, Judge Lauterpacht refers to abductions from another State's territory:

> It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of a crime. Apart from other satisfaction, *the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended.* [Emphasis added].

Id. n. 1.

Contemporary American, English, Canadian and Latin American scholars and publicists support the view. *See e.g.*, Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution in International Law, Continued*, 84 Am.J.Int'l L. 444, 474, 481 (1990); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 Minn.L.Rev. 91, 105 (1953); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 Brit.Yb.Int'l L. 265, 266 (1952); Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffee: A Case in Point*, 28 Crim.L.Q. 341, 348 (1986); Garcia-Mora, *Crim-*

inal Jurisdiction of a State Over Fugitives Brought From a Foreign Country by Force or Fraud: A Comparative Study, 32 Ind.L.J. 427, 430 (1957).

This Court's uniform holdings, beginning with *Rauscher*, *supra*, and the foregoing authorities support the view that if there was no jurisdiction in a State to make the original arrest or seizure, because it was in violation of a treaty or of international law, there is no jurisdiction in the courts to subject the person or property to its process.[26] Restoration of the status quo ante is the only proper remedy for the violation of international law that occurred here.

CONCLUSION

For the foregoing reasons, the Court of Appeals judgment ordering the respondent's repatriation should be affirmed.

Respectfully submitted,

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[26] The United States' reliance on *The Ship Richmond v. United States*, 9 Cranch (13 U.S.) 102 (1815) (Pet. Br. at 14 n.8) is misplaced. The holding of that case cannot be reconciled with this Court's decisions, *supra*, and *Richmond* must be regarded as having been overruled.

Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-712

In the Supreme Court of the United States
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF AFFIRMANCE

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In the Supreme Court of the United States
October Term, 1991
No. 91-712

UNITED STATES OF AMERICA, *Petitioner,*

v.

HUMBERTO ALVAREZ-MACHAIN, *Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF AFFIRMANCE

The Lawyers Committee for Human Rights respectfully submits this brief *amicus curiae* in support of the October 18, 1991 judgment of the United States Court of Appeals for the Ninth Circuit by Judges Alfred Goodwin, Mary Schroeder, and Samuel King. This judgment affirmed the decision of the United States District Court for the Central District of California, by Judge Edward Rafeedie, that the District Court lacked personal jurisdiction to try a citizen of Mexico who was abducted at the direction of United States drug agents from the national territory of Mexico across the international border, in violation of the 1980 Extradition Treaty between the United States and Mexico. By letters lodged with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

Statement of Interest of Amicus Curiae.

The Lawyers Committee for Human Rights is a non-profit organization founded in 1978 to protect fundamental liberties. The Honorable Marvin Frankel, former United States District Judge for the Southern District of New York and now senior partner in Kramer, Levin, Nessen, Kamin & Frankel, is Chairman of the Lawyers Committee. The Executive Director is Michael Posner, Esq., a member of the bar of California and the bar of Illinois. The Lawyers Committee regularly sends fact-finding missions to foreign countries, consults with the Congress and Executive agencies on federal policy and legislation, and from time to time, files its views in pending litigation where it may be of assistance to the Court. University research facilities and the public records of the National Archives of the United States, available to the Lawyers Committee, have afforded legal materials that may be useful to the Court in a just determination of this appeal.

Summary of Argument

All citizens of national states share a common interest in the fundamental human liberty to be free from abduction, disappearance and arbitrary arrest. The 1980 United States-Mexico Extradition Treaty promotes enforcement of criminal law, while protecting the sovereignty of each nation over its own territory, and safeguarding the civil liberties of individuals in inter-nation surrenders. The forcible abduction of Alvarez-Machain and his continued detention for trial violate the 1980 Extradition Treaty, as well as the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

By established standards of international law and precedents of this Court, personal jurisdiction over a defendant is barred where he has been brought within the territory in violation of an international convention, unless the violation has been waived by consent.

Argument

I. The kidnapping and abduction of a defendant across the international border is prohibited by the 1980 United States-Mexico Extradition Treaty.

A. The President of the United States did not authorize the abduction of Alvarez-Machain, and has not terminated, suspended, or denounced the 1980 Extradition Treaty.

The present extradition treaty between the United States and Mexico was signed in Mexico City on May 4, 1978.[1] Ratification was advised and consented to by the United States Senate on November 30, 1979. Ratifications were exchanged at Washington, D.C. on January 25, 1980, and on that date, the treaty entered into force. On February 6, 1980, the President of the United States issued a proclamation that the treaty

> "be observed and fulfilled with good faith on and after January 25, 1980, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof."[2]

The treaty with Mexico has remained in force since that date.[3] At any time since 1980, the United States could have chosen to exercise its right under Article 23(4) of the treaty, which allows either party to "terminate this Treaty by giving notice to the other Party." Termination would have taken effect six months later. Instead, the United States has remained as Contracting Party to the treaty. The treaty undertakings by the United States are promises willingly assumed and maintained.

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1. Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on Dec. 9, 1980, pursuant to Article 102 of the Charter of the United Nations, *reprinted in* J.A. 72-87.

2. *Id.*

3. *See, e.g., Department of State, Treaties in Force* 160 (1990).

Even after the loathesome events of 1985, when an American law enforcement agent Enrique Camarena-Salazar was murdered on Mexican soil, the United States chose not to exercise its treaty right to give six months notice and terminate the 1980 treaty. The United States has made plain its judgment that it is advantageous to continue legal cooperation with Mexico in fighting drug conspiracies.[4] Mexico has prosecuted and convicted numerous members of the drug conspiracy that killed Agent Camarena, with prison sentences of forty years in two cases and terms exceeding twelve years in other cases.[5]

This is not a situation where a President has taken action to terminate, suspend, or denounce a treaty. The Solicitor General has not suggested that President Bush authorized or requested the abduction of Humberto Alvarez-Machain from the territory of Mexico. The record in the case indicates that the kidnapping operation in April 1990 was authorized and undertaken by career agents of the Drug Enforcement

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4. *See, e.g.*, Remarks of Attorney General Richard Thornburgh at Joint News Conference with Mexican Attorney General Alvarez del Castillo, Mexican Secretary Solana, U.S. Secretary of State James Baker, and others (Aug. 7, 1989), *reprinted in* 29 International Legal Materials (I.L.M.) 21-22 (1990), *also in* 89 U.S. Dept. of State Bull. 78 (No. 2151) (Oct. 1989):

> With regard to extradition matters, there is in effect an extradition agreement between the Governments of the United States and of Mexico, and it has been utilized to the advantage of both parties in the past from time to time. *The extradition of money launderers, like that of an offender within either country, is subject to that treaty and remains so following our discussion today.*
>
> One of the important agreements reached between the Attorney General of Mexico and myself today was to form a study group, a working group of prosecutors within our respective departments, well versed in the technicalities of extradition to ensure that this treaty and this process are utilized to the mutual advantage of both our countries. Therefore, *beyond the reaffirming of the existence of the treaty* and the commitment to form this working group, *there was no need for any additional action to bring money launderers or any other offenders in either country within the reach of the current law.*

5. *See* Brief for United Mexican States as *Amicus Curiae*, at p. 26, n.24. Rafael Caro-Quintero has been imprisoned in Mexico on a forty-year sentence; he is a named co-conspirator of Alvarez-Machain in the instant case.

Administration.

Thus, the case does not involve any measure of the scope of the President's own authority to authorize extraterritorial operations.

The abduction of Alvarez-Machain by DEA-sponsored operatives, before any extradition request with the required evidentiary support could be presented to Mexico,[6] may well be explicable in human terms; any law enforcement agent is properly impatient when one of his colleagues has been victimized. But the decision of the agents to take the law into their own hands did not change the rules designed to protect the civil liberties of United States and Mexican citizens alike.

B. Transborder abductions violate the 1980 Extradition Treaty.

The 1980 Extradition Treaty between the United States and Mexico does *not* leave both countries free to abduct citizens from the territory of the other. The construction offered by the Department of Justice in this unprecedented case, defending the DEA abduction, would allow Mexico to kidnap an American businessman from New York City for trial on a political offense, without any violation of the Extradition Treaty. By the Department's proffered view, a Mexican police agent could spirit an American college student from Los Angeles, California, to a jail in Guadalajara on a charge for which there is no evidence, without any violation of the Extradition Treaty. This free-for-all would make a nullity of the treaty promises, and is blind to the careful procedures that

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6. Even at the present date, the United States has not presented to Mexico the evidentiary basis for an extradition request for Alvarez-Machain. Attorney General Richard Thornburgh has noted the success of the Department of Justice in obtaining custody of defendants through extradition. "Our extradition record is one of which we are justly proud. . . . Only one percent of the foreign fugitive cases handled by the Criminal Division were closed because extradition was finally and unequivocally denied by foreign jurisdictions . . . . / Only about 6% of the drug trafficking cases end with a final denial of extradition." Statement of Attorney General Thornburgh to the Senate Drug Caucus, *reprinted in* 135 Cong. Rec. S16615 (Nov. 21, 1989, legislative day of Nov. 6, 1989).

protect Americans as much as Mexican citizens from unreviewed deliveries across the border.

Extradition treaties serve the several purposes of promoting the enforcement of criminal law, protecting the sovereignty of each signatory nation over its own territory, and safeguarding the civil liberties of citizens and other individuals who are sent abroad for trial. In the American view during the last two centuries, the surrender of fugitives has been an obligation that exists solely by virtue of treaty. The history of America explains this axiom: many of our ancestors were in flight from foreign oppression, and any unstructured obligation to return persons accused of crime to a foreign government, without imposing careful treaty protections, would have endangered emigrants from tyrannical lands.[7]

To protect our own national citizens, yet provide cooperation in enforcing criminal law, the United States has negotiated treaty undertakings for the return of fugitive criminals with countries whose system of criminal justice meets our basic standards of fairness. Extradition treaties with Mexico have been in force since the middle nineteenth century,[8] long

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7. *See Francis Wharton, A Treatise on the Conflict of Laws or Private International Law* 598 (Philadelphia 1872) ("Cherishing as we have always done the right of free asylum for political and religious refugees, both as one of the happiest agents of our own colonizations and as one of the proudest prerogatives of our institutions, it was natural that our statesmen and jurists should at an early period have declared that there was no duty either moral or juridical which made it incumbent on our government, unless under the sanction of a prior treaty, to surrender to foreign sovereigns fugitives who, even when under criminal prosecution, find refuge on our shores.").

8. The earlier United States-Mexico extradition treaties are the 1862 treaty, the 1899 treaty, and the Supplementary Conventions of 1903, 1926, and 1941. *See* Treaty Between the United States of America and the United Mexican States for the Extradition of Criminals (entered into force May 20, 1862; terminated January 24, 1899), 12 Stat. 1199, T.S. No. 209; Treaty of Extradition, United States of America-United States of Mexico (entered into force April 22, 1899; terminated Jan. 25, 1980), 31 Stat. 1818, T.S. No. 242; Supplementary Convention (entered into force April 13, 1903), T.S. No. 421 (adding bribery to list of extraditable offenses); Supplementary Convention (entered into force July 11, 1926), 44 Stat. 2409, T.S. No. 741 (adding narcotics offenses, hazardous substances, and

before the multilateral treaties of this century, such as the United Nations Charter or Charter of the Organization of American States.

The 1980 Extradition Treaty between the United States and Mexico contains numerous substantive and procedural safeguards, designed to protect citizens of both countries. There would be no point to any of these protections if a foreign government could evade them by sending armed men to abduct suspects. Under the Mexico-United States treaty, an extradition can take place only for federal crimes punishable by a year or more in prison and for an agreed list of state crimes. See Article 2. Adequate evidence must be submitted, enough to bind a person over for trial *"according to the laws of the requested Party."* See Article 3. Any request for extradition shall be processed "in accordance with the legislation" of the requested party, see Article 13, and by incorporating Mexican law, this treaty provision guarantees a hearing for the defendant before he can be sent abroad for trial.[9]

The treaty prohibits extradition when the offense "is

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smuggling); Supplementary Extradition Convention Between the United States of America and the United Mexican States (entered into force April 14, 1941), 55 Stat. 1133, T.S. No. 967 (adding the crime of "being an accessory before or after the fact") (supplementary conventions terminated Jan. 25, 1980). The early history of negotiations between the United States and Mexico is discussed in *John Bassett Moore, A Treatise on Extradition and Interstate Rendition* 97 (1891).

The 1980 Extradition Treaty, *supra* note 1, has now been supplemented by the extradition provisions of the 1988 Vienna Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances. *See* p. 19 *infra*.

9. Ley De Extradición Internacional, arts. 24-27, El Diario Oficial de la Federación (December 29, 1975), *also reprinted in Códigos de Procedimientos Penales* (39th ed. 1988). The full text of the Mexican extradition law is provided and translated in Tabs *G* and *H* of the Appendix to the Brief *Amicus Curiae* of the Lawyers Committee for Human Rights, United States v. Alvarez-Machain, No. 90-50459 (9th Cir.). *See also* Statement of Gisela Von-Muhlenbrock, Legal Specialist, Hispanic Law Division, Library of Congress, *Hearings on the Extradition Reform Act of 1981, Before the Subcommittee on Crime, House Committee on the Judiciary*, 97th Cong., 2d Sess., at 431, 463-64 (1982) (discussing extradition law in Mexico). In the comparable safeguard of American law, 18 U.S.C. § 3184, a federal or state judge or magistrate must certify that treaty requirements have been met before extradition to consign a person to a foreign trial can proceed.

political or of a political character," see Article 5(1), recognizes a double jeopardy rule, see Article 6, and allows each party to refuse extradition where the death penalty could be imposed on the defendant in the requesting country and the applicable laws of the requested country would not provide for such punishment, see Article 8.

The treaty makes emergency provision for so-called "provisional arrests" by the requested government, to hold a fugitive until the supporting evidence can be delivered. See Article 11. The treaty provides that either country *may* decline to extradite its own citizens, and in such cases must submit the criminal case to domestic authorities for the purpose of prosecution. See Article 9.[10] The treaty also limits extradition for extraterritorial offenses. For a crime committed on Mexican soil where the United States is the requesting Party, extradition need be granted only if the laws of Mexico would reach a similar offense committed on United States soil, or if the fugitive is a national of the United States. See Article 1(2). The United States and Mexico agreed to each of these terms in the 1980 exchange of ratifications.

There would be no point to an extradition treaty's elaborate specification of the procedures and standards which the requested country may require of the requesting country, if those protections could be freely evaded by the requesting country's employment of armed men to abduct the defendant.

A recent example from the United States-Canada Extradition Treaty may be instructive. In February 1992, under the United States-Canada treaty, Canada agreed to surrender a Canadian citizen to the courts of Florida, but required assurances that the death penalty would not be imposed for

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10. Under the 1862 treaty, the United States routinely declined to extradite Americans to Mexico, because it lacked authority under United States law. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 13-16 (1936); *see also John Bassett Moore, Report on Extradition with Returns of All Cases* 207-08 (1890). The 1899 treaty recast the provision for the surrender of nationals, creating power in the American Executive to surrender American nationals after judicial scrutiny of the evidence, but imposing no obligation to do so.

the particular offense. The right to so restrict the surrender of a fugitive was agreed to by the United States in article 6 of the Canadian treaty.[11] Under the logic of the petitioner's argument in this Court, the United States could instead have sent agents into Canada to abduct the defendant, and would have remained free to impose a penalty no longer permitted by Canadian law.

"Kidnapping" and "abduction" are high on the list of crimes subject to extradition under the 1980 United States-Mexico treaty.[12] It is startling to suppose that the treaty allows a signatory to use abduction, when abduction itself is announced as a crime subject to extradition and punishment under the self-same treaty.

Secretary of State James Blaine, who administered relations under the first United States-Mexico extradition treaty in the nineteenth century, described the purpose served by the extradition treaty in safeguarding residents from abrupt and unexplained removals from their own countries.

> The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and *does not authorize* either party, *for any cause*, to deviate from those forms or *arbitrarily abduct from the territory, of one party, a person charged with crime, for trial within the jurisdiction of the other.*[13]

In 1887, Secretary of State Thomas Bayard spoke of government-sponsored abductions in the same light, as a clear

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11. *See* Treaty of Extradition, United States-Canada, art. 6, 27 U.S.T. 983, T.I.A.S. No. 8237 (signed June 28 and July 9, 1974; entered into force, Mar. 22, 1976); N.Y. Times, Feb. 14, 1992, at A3, cols. 1-3.

12. 1980 Extradition Treaty, *supra* note 1, art. 2(1) ("Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix . . . ."); & Appendix to 1980 Extradition Treaty, cl. 4 (including "Kidnapping; child stealing; abduction; false imprisonment" as extraditable crimes).

13. Letter of Secretary of State James Blaine to O.M. Roberts, Governor of Texas (May 3, 1881) (emphasis added), in *Domestic Letters of the Department of State, 1784-1906* (National Archives Microfilm Publication M40, Roll 93); *also excerpted in* 4 *John Bassett Moore, A Digest of International Law* 330 (1906).

violation of the extradition treaty. When Francisco Arresures was seized in Texas by three local deputy sheriffs and a Mexican police officer, and was forced across the border to Mexico without observing extradition treaty processes, Bayard complained that Arresures' return to Mexico was "obtained not in accordance with, but *in fraud of existing treaties.*"[14]

The recorded views of Secretary Blaine and Secretary Bayard indicate that the Department of Justice is simply wrong in asserting (Pet. Br. at 9) that "nothing in [the treaty's] history, suggests that it regulates apprehensions made without invoking the treaty's terms." Secretary Blaine and Secretary Bayard's consistent view that extradition treaties prohibit government-sponsored abductions matches common sense. It is the central tenet of an extradition treaty that each country's exclusive jurisdiction over its own territory will be respected. Otherwise, there would be no need for formal extradition in the first place—bands of Mexican

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14. Letter of Secretary of State T. F. Bayard to Thomas C. Manning (February 26, 1887), in *Diplomatic Instructions of the Department of State, 1801-1906, Mexico* (National Archives Microfilm Publication M77, Roll 117). Secretary of State Bayard denounced the "kidnapping" of defendant Arresures and his "forcible transportation to Mexico." The hazards for all concerned in the disregard of appropriate legal process are also illustrated by the outcome of the Arresures case: defendant Arresures was killed during the incident. His abductors alleged self-defense, but Secretary of State Bayard was skeptical of the claim.

See also Statement by Secretary of State George Shultz to the Florida Probation and Parole Commission, *reprinted in* Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l L. 207, 208 (1984), concerning the claim of Canadian citizen Sidney L. Jaffe that he was kidnapped by agents of the State of Florida while in Canadian territory. Observed Secretary Shultz:

> The United States has an extradition treaty with Canada. That treaty could have been utilized to secure Mr. Jaffe's return . . . .
>
> . . .
>
> As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, *it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.*

Id. (emphasis added).

police could invade Texas to recapture Mexican or American fugitives, and vice versa.[15]

The first United States-Mexico extradition treaty in 1862 followed lengthy negotiations between the United States and Mexico. Its preamble clearly recognized the territorial sovereignty of both of the signatories:

> The United States of America and the United Mexican States, having judged it expedient, with a view to the better administration of justice and to the prevention of crimes *within their respective territories and jurisdictions*, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, *under certain circumstances*, be reciprocally delivered up, have resolved to conclude a Treaty for this purpose . . . .[16]

The language of the modern 1980 Extradition Treaty also recognizes the territorial jurisdiction of each contracting party. Article 4(1) defines the term "territory of a Contracting Party." Article 20 of the 1980 Extradition Treaty expressly recognizes the right of each country to deny the other access to its own national territory for the transport of prisoners surrendered by a third State. Article 14 makes plain that the decision to grant extradition belongs to the territorial sover-

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15. *See Samuel T. Spear, The Law of Extradition* 70-74 (Albany 1884): The necessity for extradition grows out of the fact that, *except in cases specially provided for by treaty*, the penal laws of one country cannot operate within the jurisdiction of another. The sovereignty of a nation within its own territory is exclusive and absolute. . . . In truth, the criminal, by his flight to another State, becomes (although but for a time) the subject of the supreme power of that State, and immediately enjoys the protection and guardianship of that State. *From that guardianship he cannot be forcibly taken, except under special agreement*, the terms of which, we presume, certainly do not extend further than to those very grounds on which the surrender was demanded and granted.

See also Theodore Woolsey, Introduction to the Study of International Law 179 (1860).

16. 1862 Extradition Treaty, *supra* note 8, preamble (emphasis added); *accord* 1899 Extradition Treaty, *supra* note 8, preamble.

eign; it requires a statement of reasons for any decision not to extradite, and provides that no surrender of a person may take place on national territory without the consent of competent national authorities.

The brief of the Department of Justice claims the absence of any article in the 1980 treaty stating *in haec verba* that the national territory of the treaty parties will be respected. (Pet. Br. 23). But, as noted above, the language of the treaty recognizes territorial sovereignty throughout its text. An extradition treaty sets the conditions under which a foreign state *may demand as of right* the surrender of a fugitive criminal from the domestic territory of another state. Thereby, the treaty parties have plainly agreed that when those conditions are not met, fugitive surrenders need not be made. As the Supreme Court noted in *Factor v. Laubenheimer*, "the principles of international law recognize no right to extradition apart from treaty." 290 U.S. 276, 287 (1933).

The joint communique and public statements of the United States and Mexico in August 1989 affirmed the three-fold purpose of extradition treaties — to fight crime, while safeguarding sovereignty and civil liberties.[17] Petitioner's present narrow view of the purposes of extradition treaties (Pet. Br. 25) is inconsistent with this record.

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17. *See* Statement of Mexican Attorney General Alvarez del Castillo at Joint News Conference with U.S. Attorney General Richard Thornburgh, U.S. Secretary of State James Baker, Mexican Secretary of State Solana, and others (Aug. 7, 1989), *reprinted in* 29 I.L.M. 21, 22 (1990), *also in* 89 U.S. Dept. of State Bull. 78 (No. 2151) (Oct. 1989) ("What we discussed was . . . what Attorney General Thornburgh has said: a review of the [extradition] treaty with, I believe, both parties' intention of making it faster and more efficient when prosecuting infractions of all types, *while protecting the basic freedoms of citizens of the United States as well as of Mexico.*"); Joint Communique, United States-Mexico Binational Commission, Aug. 7, 1989, *in* 29 I.L.M. 18, 19-20 (1990), *also in* 89 U.S. Dept. of State Bull. 82 (No. 2151) (Oct. 1989) ("*Conscious of the need for respect due to each country's sovereignty*, the sides considered important legal questions with a view to cooperating in the fight against criminal actions having international effects. In this context, both delegations agreed: . . . To analyze the possibility of ensuring more effective application of the current extradition treaty.").

The text of a treaty is also to be interpreted against the general background of international law.[18] Under the deepest norms of international law, the jurisdiction to apprehend offenders is limited to the political government that is sovereign in a particular country, and this standard is incorporated into the 1980 Extradition Treaty.[19]

The good faith with which extradition treaties are to be read was emphasized in *United States v. Rauscher*, 119 U.S. 407 (1886). The Department of Justice argued in *Rauscher* that Great Britain had failed to insert any express term in the Webster-Ashburton Treaty to forbid the trial of a defendant on a second charge (never presented to the British extradition judge) once the defendant was brought to the United States.[20] There was indeed no term that expressly forbade trial on a second charge. The Supreme Court held, against the Solicitor General's objection, that trying the prisoner on a second charge without the consent of Great Britain would

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18. *See* Vienna Convention on the Law of Treaties, art. 31 ("General rule of interpretation"), U.N. Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679 (1969). The Vienna Convention on the Law of Treaties is "generally recognized as the authoritative guide to current treaty law and practices." *See* Letter of Submittal by the Secretary of State to the President, in S. Exec. Doc. L, 92d Cong., 1st Sess. at 1 (1971), *also quoted in American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States*, pt. 3, intro. note.

19. *See American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States* § 432(2) (1987) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); *id.* § 432 comment b ("*Territoriality and law enforcement.* It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent."); *L. Oppenheim, International Law: A Treatise* § 125, at 179-80 (1912) ("The duty of every State itself to abstain and to prevent its agents and subjects from any act which contains a violation of another State's independence or territorial . . . supremacy is correlative to the respective right of the other State. . . . a State is not allowed to send . . . its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.").

20. *See* Webster-Ashburton Treaty, United States-Great Britain, art. 10 (signed August 9, 1842; entered into force October 13, 1842), 8 Stat. 572, T.S. No. 119.

violate the "manifest scope and object of the treaty." 119 U.S. at 422. *Rauscher* may be explained, petitioner now suggests (Pet. Br. 18) "in light of specific terms in the . . . Treaty *that required the presentation of evidence on the particular crime for which extradition was sought.*" That is just the point — in *Rauscher* and in *Alvarez-Machain.* A defendant is guaranteed that his own national authorities will be permitted to examine the charge and the evidence warranting binding-over before he is tried in another country.

The same principle in interpreting treaties, to give force to the full understanding of the parties, was observed in *Cook v. United States*, 288 U.S. 102, 108 (1933), a case concerning American seizure of a foreign vessel for a smuggling offense, beyond one hour from shore. The Solicitor General, advancing arguments "not of the Department of Justice but of the lawyers for the Government," 288 U.S. at 112 n. 3, suggested that the treaty with Great Britain did not contain any explicit language promising that the United States would refrain from seizing British vessels this far out from shore. The treaty, said the United States, only promised that Great Britain would "not protest" seizures *within* the one hour range. The Supreme Court rejected this crab-like reading of the treaty.

> *The [Government's] argument is that the Treaty settled the validity of the seizure only for those cases where it was made within the limits described in the Treaty;* and that since this seizure was made beyond one hour's sailing distance from the coast the Treaty did not apply. In construing the Treaty its history should be consulted. . . . The history reveals that serious differences had arisen between the two Governments . . . and that, for the purpose of resolving them, *the parties determined to deal completely with the subject of search and seizure, beyond our territorial limits*, of British vessels suspected of smuggling liquors."

288 U.S. at 111-12 (emphasis added, footnote omitted). In *Cook*, the Supreme Court's regard for the full understanding of the treaty was striking, because the Congress had previously authorized seizures beyond one-hour's sail. In the instant

case, the seizure of a foreign citizen on foreign soil without the consent of the foreign country has *never* been authorized by the Congress.[21]

The petitioner's suggestion that there is no treaty term prohibiting state-sponsored kidnapping in Mexico (Pet. Br. 23) — apart, of course, from the inclusion of kidnapping and abduction in the list of crimes punishable under the treaty — and that the treaty is not "invoked" in an abduction (Pet. Br. 27) completely disregards the original purpose of the extradition treaties, in settling affairs along the border. The United States-Mexico extradition treaties arose from a need to stop the vigilante and posse raids that were taking place back and forth across the United States-Mexico border. Seeking an extradition treaty in 1850, President Millard Fillmore said to the Senate, "The length of the boundary line between the two countries, extending as it does from the Pacific to the Gulf, renders such a convention indispensable to the maintenance of good order and the amicable relations now so happily subsisting between the sister republics."[22]

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21. *See, e.g.*, Exchange between Assistant Counsel James Dempsey and then Assistant Attorney General William Barr, *Hearing Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary* (Nov. 8, 1989), 101st Cong., 1st Sess., at 66, *reprinted in Cong. Info. Serv.* 91-H521-45:

> **Mr. Dempsey:** Now, in exercising jurisdiction over crimes committed abroad, under the provisions of [a] statute[,] would you consider it relevant that Congress declined to authorize self-help?
>
> **Mr. Barr:** If I was considering that statute as a source of authority, obviously that would be relevant.

22. Statement of Millard Fillmore, July 20, 1850, *quoted in John Bassett Moore, A Treatise on Extradition and Interstate Rendition*, *supra* note 8, at 97. *See, e.g., Case of 1881*, in *id.* at 287 ("Texas sheriff, accompanied by three men, had crossed from Tombstone, Arizona, into Mexico, and there captured a fugitive criminal, whom they had taken back into Arizona without any form of law." Secretary of State requested Secretary of Interior "to direct that proper measures be taken by the Territorial authorities for the punishment of any guilty parties, and *for the future maintenance of law and treaty obligations in such matters*." Mexico did not request release of criminal.) (emphasis added); *see also* Note of Mexican Minister Zamacona to Secretary of State James Blaine (July 25, 1881), in *Notes from the Mexican Legation to United States Department of State 1821-1906* (National Archives Microfilm Publication M54, roll 19) (Tombstone sheriff and

The history of United States-Mexico extradition treaties suggests:

> (1) The state parties have sought increasing *national and judicial* safeguards in scrutinizing fugitive surrender.[23]
>
> (2) The state parties have relied upon *renegotiation* of the terms of the treaty when existing arrangements were inadequate.[24]

By its plain language, structure, and history, the 1980 Extradition Treaty clearly contemplates that the treaty parties will not seek to evade its terms by sponsoring abductions of the other's citizens. The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion

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three men returned with fugitive from Mexico "without complying with the formalities prescribed by the extradition treaty.").

23. The increasing concern for national and judicial scrutiny of fugitive surrenders may be seen in the gradual exclusion of local border authorities from the extradition process. In the 1862 treaty, surrender of fugitives could be made through diplomatic channels or, in the case of crimes committed in border states or territories, through the local civil or military authorities. In the 1899 treaty, the competence of border authorities was reduced; before surrender across the border could proceed, a record of judicial examination of the fugitive had to be made and "forwarded to the proper executive authority of the United States of America or of the United Mexican States, as the case may be," for determination whether "according to the law and the evidence, the extradition is due pursuant to the terms of this convention."

The 1980 Extradition Treaty *eliminated* any delegation of authority to border officials. Extradition demands must be presented through diplomatic channels, with provisional arrests available in cases of "urgency." 1980 Extradition Treaty, *supra* note 1, arts. 10 & 11. Surrenders across the border must be preceded by judicial scrutiny.

24. *Id.*, art. 13. In the course of the United States-Mexico treaty relationship, the scope of crimes subject to extradition also has been modified and expanded by supplementary agreements. The 1903 Supplementary Convention added the crime of bribery. The 1926 Supplementary Convention added "[c]rimes and offenses against the laws for the suppression of the traffic in and use of narcotic drugs," smuggling, and crimes involving injurious or poisonous chemicals. The 1941 Supplementary Convention added the criminal acts of "an accessory before or after the fact." *See supra* note 8.

that any different understanding was reached with Mexico.[25] There is also no indication in the record that Mexico has declined any properly supported United States request for prosecution or extradition of Alvarez-Machain.

Some extradition treaties provide for the mandatory extradition of national citizens. *See, e.g.*, Treaty of Extradition, United States-Ireland, art. 1, T.I.A.S. No. 10813 (signed July 13, 1983; entered into force Dec. 15, 1984). In other cases, as with Mexico, France, and Germany, the United States has rested with the guarantees of a "prosecute or extradite" term for nationals — each signatory promises that upon a proper evidentiary showing, criminal defendants will be prosecuted by national authorities if extradition is not granted.[26] These guarantees of the right to decline extradition of one's own citizens are as important to the United States as to the foreign signatories; there will be occasions when the United States does not wish to subject its citizens to the rigors of foreign trial or a foreign jail. Yet under the Government's new view, this important guarantee can be evaded by the "self-help" of foreign abductors.

American drug enforcement agents need not breach United States treaty promises if present treaty terms are unsatisfactory. Treaty terms can be renegotiated. The *ex post facto* clause does not limit extradition treaties; a renegotiated treaty can be applied to crimes and offenses committed previously.[27]

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25. A letter drafted *after the event* by the newly appointed Legal Advisor to the State Department, setting out the Department's new interpretation for the purposes of this litigation, is no substitute for this missing evidence from the negotiating process. *See* Letter from Edwin D. Williamson to Attorney General Richard Thornburgh (Sept. 26, 1990), *reproduced in* Addendum of the Appellant United States at 68, United States v. Alvarez-Machain, No. 90-50459 (9th Cir. 1990).

26. *See* Treaty of Extradition, United States-France, art. 5, 37 Stat. 1526, T.S. No. 561 (signed Jan. 6, 1909; entered into force July 27, 1911), and Supplementary Treaty, United States-France, art. 3, 22 U.S.T. 407, T.I.A.S. No. 7075 (signed Feb. 12, 1970; entered into force Apr. 3, 1971); Treaty of Extradition, United States-Germany, art. 7, 32 U.S.T. 1485, T.I.A.S. No. 9785 (signed June 20, 1978; entered into force Aug. 29, 1980).

27. *See, e.g.*, 1980 Extradition Treaty, United States-Mexico, *supra* note 1,

Mexican law also seems to allow the Mexican government to grant extradition beyond the scope of the treaty; the treaty serves to define what the United States may demand *as of right*; Mexican statute law further describes what the Mexican national government may allow as a matter of discretion.[28] In such cases, the Mexican statute provides procedural protections for the fugitive comparable to those in a treaty request, and requires that the requesting country be willing to surrender fugitives in like circumstances.[29] The resort to kidnapping by agents of the Drug Enforcement Administration thus bypassed other available routes for seeking effective prosecution of foreign fugitives.[30]

II. The 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs also prohibits government-sponsored abductions.

On December 20, 1988, the United States signed the

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art. 22(1) ("This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force."); *see also* Supplementary Extradition Treaty, United States-United Kingdom, -- UST --, TIAS No. -- (signed June 25, 1985; entered into force Dec. 23, 1986), *also in* 24 I.L.M. 1105-09 (1974).

28. Ley De Extradición Internacional, arts. 1, 3, 14, 16 & 36, El Diario Oficial de la Federación (Dec. 29, 1975), *also reprinted in Códigos de Procidimientos Penales*, *supra* note 9, at 36.

29. *Id.*, art. 10. In American law, delivery of foreign fugitives beyond the mandatory requirements of the treaty would require statutory authority from the Congress, except where a fugitive may be subject to deportation under American immigration laws. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936) ("There is no executive discretion to surrender to a foreign government, unless that discretion is granted by law. . . . It must be found that statute or treaty confers the power."); *see also* Remarks of Senator Helms, 135 Cong. Rec. S11617 (Nov. 21, 1989; legislative day Nov. 6, 1989) ("In the past 150 years, the United States has only engaged in extradition with those countries with which the United States had extradition treaties. In other words: No treaty — no extradition.").

30. Upon the repatriation of defendant Alvarez-Machain to Mexico pursuant to Judge Rafeedie's order, the United States also could request the Government of Mexico to detain Alvarez-Machain under Articles 9 and 11 of the 1980 Extradition Treaty, while legally sufficient documentation for his lawful extradition or his prosecution in Mexico is assembled and submitted to the Mexican government and courts by the United States.

Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[31] This treaty states in its preamble that it is a "comprehensive . . . convention . . . directed specifically against illicit traffic" in drugs. The 1988 Vienna Convention was approved by the Senate on November 6, 1989,[32] and was ratified by the United States on February 20, 1990,[33] before the DEA agents' abduction of Alvarez-Machain took place, and the treaty came into force on November 11, 1990.[34] The 1988 Vienna Convention requires signatories to prosecute and penalize drug offenses, and adds a comprehensive list of drug offenses to all previously existing bilateral extradition treaties. Article 6 recognizes the right of each party signatory to decline to extradite its own nationals.[35]

Most tellingly, Article 2(3) of the multilateral 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs also provides that

> A party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the author-

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31. The text of the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/15 (opened for signature Dec. 20, 1988), is set out at 28 I.L.M. 493 (1989).

32. 135 Cong. Rec. S16616 (Nov. 21, 1989, legislative day Nov. 6, 1989).

33. *See* Multilateral Treaties Deposited With the Secretary General: Status as at 31 December 1990, at 277 (United Nations 1991).

34. *Id.* Mexico signed the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on February 16, 1989, and deposited its ratification on April 11, 1990. *Id.* at 276.

35. Statement of Attorney General Richard Thornburgh to the Senate Drug Caucus, *reprinted in* 135 Cong. Rec. S16618, S16620 (Nov. 21, 1989; legislative day of Nov. 6, 1989) ("The United States had hoped to include a broad obligation to extradite one's own nationals . . . there was overwhelming opposition from the northern European countries that, for either political or legal reasons, would not accept any provision on the extradition of their nationals, even a hortatory provision. . . . The article does, however, obligate a party to submit the case to its competent authorities for the purpose of prosecution when it refuses to extradite an offender because the offender is one of its nationals or because the offense occurred on its territory or on its vessel or aircraft.").

ities of that other Party by its domestic law.[36]

The 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs thus reaffirms the long-time understanding of the United States of the obligation to refrain from violating the domestic sovereignty of an extradition treaty partner, especially in the area of narcotics addressed in this "comprehensive" convention.

The 1988 Vienna Convention was already ratified by the United States at the time that the several DEA agents involved in this case solicited and paid for the abduction of Alvarez-Machain. Under the Vienna Convention on the Law of Treaties, a state that has ratified a treaty is obliged "to refrain from acts which would defeat the object and purpose of the treaty," pending its entry into force.[37] This obligation also arises upon signing a treaty.[38] Both Mexico and the United States were signatories to the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs *before* the kidnapping of Alvarez-Machain.

III. The United States District Court lacks jurisdiction to try a defendant brought before it by government-sponsored kidnapping, where the treaty violation has not been cured by consent. To do otherwise, would involve the Court in a continuing violation of international law.

The view that American extradition treaties forbid the exercise of domestic criminal jurisdiction when state-sponsored abduction has been used to obtain the defendant and the foreign state has objected, is supported by the authoritative *Harvard Research in International Law*, 29 Am. J. Int'l L. 1 (Supp. 1935). This project—directed by Manley O. Hudson,

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36. At the Vienna Conference on December 13, 1988, the United States delegate endorsed draft Article 2(3) (then numbered 1(3)). *See* 2 Official Records of the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988, at p. 171 (Committee I, 28th meeting, Dec. 13, 1988).

37. *See* Vienna Convention on the Law of Treaties, *supra* note 18, art. 18(b).

38. *See id.* art. 18(a).

professor of law at Harvard Law School, later judge of the Permanent Court of International Justice, and Chairman of the International Law Commission — was advised by an extraordinary group of American constitutional and international lawyers, including Elihu Root and Learned Hand.[39]

The Harvard Study of Jurisdiction with Respect to Crime set out the following rule for criminal jurisdiction:

> Article 16. Apprehension in Violation of International Law
>
> In exercising jurisdiction under this Convention, *no State shall prosecute or punish any person who has been brought within its territory* or a place subject to its authority by recourse to measures *in violation of* international law or *international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.*

Id. at 623. The Reporter's Comment noted as follows:

> In the United States, for example, *the law is in accord with this article* in cases in which a person has been brought within the country by recourse to measures *in violation of an international convention.*

Id. at 624 (emphasis added). The Comment cited *Cook v. United States*, 288 U.S. 102 (1933), *Ford v. United States*, 273 U.S. 593 (1927), and *United States v. Rauscher*, 119 U.S. 407 (1886), and remarked the "noteworthy language" of *United States v. Ferris*, 19 F.2d 925 (N.D. Cal. 1927), that described the "complete lack of jurisdiction" in cases where

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39. The Advisory Committee to the project was chaired by George W. Wickersham, former Attorney General of the United States and President of the American Law Institute, and included Frederic R. Coudert, Esq.; Green H. Hackworth, Legal Adviser of the Department of State; Judge Learned Hand of the United States Court of Appeals for the Second Circuit; former Secretary of State Elihu Root; and James Brown Scott, president of the American Society of International Law, director of the Division of International Law of the Carnegie Endowment for International Peace, and later Legal Adviser to the Department of State.

a person was seized by a state party in violation of an international convention.

In *United States v. Cook*, as we have seen, the Supreme Court declined the suggestion that the United States was free to seize a British vessel for smuggling contraband beyond a one-hour limit from shore. The Supreme Court also held that the federal courts had responsibility to enforce the treaty's implicit jurisdictional limits. The Supreme Court rejected the Solicitor General's suggestion that one should distinguish between the initial illegal custody by the Coast Guard that effected the seizure and subsequent custody by the marshal of the District Court:

> Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. *To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare United States* v. *Rauscher*, 119 U.S. 407.

288 U.S. at 121-22 (emphasis added).[40] The Solicitor General does not suggest that *Cook* should be overruled. Yet under the Department of Justice's theory, a foreign ship would have more treaty protection in court than a foreign citizen.

Similarly, *United States v. Ferris* involved the criminal prosecution of crew members of a Panamanian flag vessel, seized 270 miles off the west coast of the United States. In sustaining the individual defendants' objection to the criminal jurisdiction of the District Court over their persons, Judge Bourquin said:

> It seems clear that, if one legally before the court cannot be tried because therein a treaty is violated [as in *Rauscher*], for greater reason *one illegally before the court, in violation of a treaty, likewise cannot be*

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40. The illegal seizure in violation of the treaty deprived the District Court of jurisdiction over the vessel, even though the Court could have taken subject matter jurisdiction of an attempt to smuggle goods into the United States pursuant to a legal seizure of the vessel.

> *subjected to trial.* Equally in both cases is there absence of jurisdiction.

19 F.2d at 926 (N.D. Cal. 1927) (emphasis added).

This reading of the extradition treaty is not only faithful to its text and intention. It also will aid the safety of American citizens, as much as Mexican nationals. As the history of our relations with Mexico and Canada make clear, abductions can occur in both directions across a border.

Petitioner errs in characterizing treaty limits on personal jurisdiction as judicial creation of a "cause of action" or balancing of interests.[41] Rather, it is a matter of a court's traditional responsibility to ascertain its own jurisdiction, a task at the center of the judicial function. Article VI of the United States Constitution makes a treaty "the supreme Law of the Land," and a similar supremacy clause is found in Article 133 of the Mexican Constition.[42] An American court cannot avoid the question whether the exercise of its own jurisdiction is consistent with the treaty. Indeed, if the 1980 Extradition Treaty were not self-executing and did not limit judicial jurisdiction, it is hard to imagine what the United States Government could do to abate the proceedings if an American state or local law enforcement official decided to kidnap a defendant across national borders and put him on trial in an American state court. Article VI of the Constitution makes a treaty "the supreme Law of the Land" for state and federal officials alike.

A person abducted by state agents in violation of a treaty is entitled to be restored to his own nation.[43] Where a court declines to exercise personal jurisdiction over a defendant, because the defendant was forcibly brought before the court in violation of a treaty obligation, the court merely fulfills its

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41. Brief of Petitioner United States, at 35, 40.

42. *See* Constitution of Mexico, art. 133, *reprinted in* 10 *Constitutions of the Countries of the World* (A. Blaustein & G. Flanz eds. 1988).

43. *See American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States* § 432 comment c (1987) ("If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.").

obligation not to commit or extend an international delict.[44] A defendant is detained for trial by order of the court, not by the Attorney General acting in his own exclusive province. If a North American were kidnapped by agents of a Latin American country and put on trial in a Latin American courtroom, the responsibility for his return and the continuing wrongful character of his detention would not cease merely because he was forced over the frontier into the abductor's territory.

The intimate involvement of the judiciary in the administration of extradition treaties has also been set by the Congress itself, which delegates to federal judges the authority to refuse foreign extradition if the required factual showing and legal requisites of the extradition treaty are not satisfied. 18 U.S.C. § 3184 (1988).[45] A court's determination of its

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44. *Cf. Peter Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* 3 n. (Philadelphia 1824) (emphasis omitted):

> The law of nations, being the common law of the civilised world, may be said, indeed, to be a part of the law of every civilised nation. . . . It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction is bound to administer it. Whether there is or not a national common law in other respects, this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.

See also Note from Secretary of State Hamilton Fish to British Minister Edward Thornton (Jan. 10, 1877) (emphasis added), *in Notes to Foreign Legations in the United States from the Department of State 1834-1906, Great Britain* (National Archives Microfilm Publication M99, Roll 46) ("the recapture and removal of the prisoner [Peter Martin] from the jurisdiction of the United States to British soil was an illegal, violent, and forcible act, *which cannot justify the subsequent proceedings whereby he has been, is, or may be restrained of his liberty.*"); *also in* 1 *John Bassett Moore, A Treatise on Extradition and Interstate Rendition, supra* note 8, at 286; *and in* 1877 *Foreign Relations of the United States* 266-71.

45. *See In re* Mackin, 668 F.2d 122, 135 (2d Cir. 1981) (Friendly, J.) (citing late eighteenth century "perception that extradition without judicial oversight was 'highly dangerous to liberty and ought never to be allowed in this country.'"); Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J.

jurisdiction to try a criminal case is not an intrusion on any prerogative of the executive. The centrality of the courts in enforcing extradition treaties is also shown by the suggestions of Secretaries of State and Attorneys General that a defendant should seek a judicial remedy before resorting to diplomatic recourse.[46]

IV. *Ker v. Illinois* and *Frisbie v. Collins* are not applicable. *United States v. Noriega* is wholly distinct, for Panama did not object to the arrest of Noriega, and the transfer of Noriega took place during a period of armed hostilities pursuant to Presidential order.

The petitioner suggests that reversal is mandated by *Ker v. Illinois*, 119 U.S. 436 (1886), and the domestic law rule of *Frisbie v. Collins*, 342 U.S. 519 (1952). These cases do not support the proposed deference to the DEA in matters of liberty and judicial jurisdiction.

Ker was decided the same day as *Rauscher*, and written by the same Justice, Samuel Miller. Harvard historian Professor Charles Fairman noted in his famous article *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678, 682 (1953), that *Ker* came

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229 (1990).

46. *See, e.g., Case of Edward Underwood*, in 4 *John Bassett Moore, A Digest of International Law*, *supra* note 13, at 318 (prisoner extradited from Canada on murder charge, acquitted, then rearrested and convicted on two charges of robbery. British ambassador was advised by the United States that "*as the question was of a judicial nature, there were no steps to be taken to fulfill the obligations of the treaty except through the appropriate judicial proceedings*") (emphasis added); *accord* Opinion of Attorney General John W. Griggs (Mar. 27, 1901), 23 Op. Att'y Gen. 431, 434.

See also *Case of Henry Acosta*, in 4 *John Bassett Moore, A Digest of International Law*, *supra* note 13, at 318-19 n.; *and in* Opinion of Attorney General Philander Knox (Dec. 24, 1901), 23 Op. Att'y Gen. 604, 607 (defendant Acosta extradited from Mexico for offense, convicted, served sentence, and on day of release was rearrested for another offense committed prior to his extradition. Attorney General Knox said, "I do not mean to intimate that his only resort is to the courts, or that if they deny him any rights which he may possess, the Federal Government is powerless or free from obligation to interfere . . . . *My present opinion is only intended to intimate that his primary resort is to the courts.*") (emphasis added).

before the Supreme Court upon the limited scope of review permitted by a writ of error.[47] The Court considered only Ker's claim that he had a right of asylum in Peru despite the *willingness* of the legitimate government of Peru to have him be tried in the United States for financial crimes committed on American soil. A review of the diplomatic notes received from Peru between January 1, 1883 through January 1, 1887 shows *no objection* was made by Peru to the exercise of criminal jurisdiction by the Illinois courts in *Ker*.[48] This was a finding of fact by the Illinois court as well.[49] Equally importantly, at the time that Ker was seized in Lima, that city was occupied by the armed forces of Chile. The Pinkerton agent who was seeking Ker applied to Admiral Lynch of the Chilean forces, and the Admiral agreed to release defendant Ker for return to the United States. *See* Statement of George Hunt, Attorney General of Illinois, in Brief for Defendant in Error, Ker v. Illinois, *reprinted in* Fairman, *supra*, 47 Am. J. Int'l L. at 684-85.[50] *Ker* thus involved a voluntary surrender of a defendant by the controlling territorial sovereign.

In contrast, the government of Mexico has consistently objected to the exercise of criminal jurisdiction by the United States, and has demanded the return of the defendant Alvarez-Machain.

In addition, *Ker* involved a private Pinkerton agent who had been authorized by the federal government and the State of Illinois only to make a formal treaty demand on the

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47. *See* Revised Statutes § 709 (1875).

48. *See Notes from the Legation of Peru, 1827-1906* (National Archives Microfilm Publication T802).

49. *See also* Ker v. Illinois, 110 Ill. 627, 640 (1884) (Scott, J.) ("*if the government of Peru does not complain* of the arrest of defendant within its jurisdiction, as an infraction of international law, it does not lie in the mouth of defendant to make complaint on its behalf.") (emphasis added).

50. Professor Fairman noted:

> *the military governor was indeed the authority competent to surrender* a fugitive present in the occupied territory. . . . Accepting as accurate the factual recital of the [Illinois] Attorney General, there was no invasion of Peruvian sovereignty or other breach of international law.

Fairman, *supra*, 47 Am. J. Int'l L. at 685-86 (footnotes omitted, emphasis added).

government of Peru. The Pinkerton agent's actions in obtaining custody of Ker, by treating with the occupying forces of the government of Chile, was undertaken without the knowledge or authority of prosecuting authorities of either Illinois or the United States government. Again, in contrast, the District Court found that the abduction of Alvarez-Machain was undertaken with the prior knowledge, approval, and promised reward of Special Agents of the United States Drug Enforcement Administration.[51]

Finally, in *Ker v. Illinois*, the extradition treaty reserved to Peru no discretion to refuse delivery, except for the required evidentiary showing. Ker was an American national charged for a larceny committed on American soil.[52] The United States agreed in 1980 that Mexico and the United States would retain the right to refuse to surrender their own nationals.

The facts and law of the case of Alvarez-Machain arise under the bilateral United States-Mexico treaty, and are also distinct from American domestic removal of a defendant from, for example, the state of Texas to the state of California. The domestic transfer of defendants within the American

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51. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 603 & n.7 (C.D. Cal. 1990). Lower court decisions since *Ker* have concerned situations distinct from the present case: either the foreign government made no protest under the extradition treaty, or a private individual acted on his own without prior authorization from United States officials. For example, in the 1905 incident of Antonio Martinez, see Pet. Br. at 28 & n. 23, the fugitive was taken from Mexico by a private party. The abductor, Antonio Felix, was extradited by the United States to Mexico for full punishment—hardly imaginable if the abduction had been carried out at the request of United States officials. As Hackworth observes, the Martinez case fell into the distinct category of "breaches by private persons." *See* 2 *G.H. Hackworth, Digest of International Law* § 152, at 321 (1941).

52. *See* Brief for Defendant in Error, at 17-19, *Ker* v. *Illinois*:

> The effect upon Ker of the acts complained of is identical with what would have happened him if Peru had discharged her treaty obligation. . . . If every act, from the moment of his capture, is declared illegal, and Ker returned to the place whence he was taken, it will, at that instant, be the duty of Peru to surrender him to the United States for trial. Two more trips across the sea would be the outcome to Ker of this extraordinary venture.

union is governed by Article IV, Section 2 of the United States Constitution, by federal statute, 18 U.S.C. § 3182, and by state laws frequently patterned on the Uniform Criminal Extradition Act, 11 U.L.A. 51 (1974). The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* correctly notes that the protections available in domestic transfers of fugitives are less rigorous than in international extradition.[53] These lessened standards make sense in a domestic setting, since all state court proceedings are governed by the basic protections of constitutional due process, and a person is not removed from his own nation.

In international extradition the problem is quite distinct, for the requested country may properly wish to assure itself of the evidence supporting another country's request, and there are often differences in the basic procedures of trial.[54] The protections appropriate to regulate the extradition of defendants between foreign jurisdictions, need not apply in domestic criminal process. *See* Frisbie v. Collins, 342 U.S. 519 (1952); Gerstein v. Pugh, 420 U.S. 103 (1975).

This case is also wholly distinct from the matter of

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53. *See American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States*, § 478 reporters' note 8 (1987). For example, the double criminality rule, requiring that the conduct be a crime under the laws of both countries, and the doctrine of specialty, requiring that the defendant be tried only for the crime for which extradition is granted, do not apply between States of the Union. Similarly, in domestic deliveries, "the arrest warrant is issued by the governor of the requested state, not by a magistrate; and, in general, judicial scrutiny of the extradition request is narrower than in international extradition." *Id.* Unlike international extradition, in domestic fugitive delivery there is no inquiry by the courts of the requested state into the criminal evidence supporting the claim of the requesting state.

54. Secretary of State Thomas Jefferson warned of the special need for safeguards in international extraditions. *See* Thomas Jefferson, Heads of consideration on the establishment of Conventions between the United States and their neighbors for the mutual delivery of Fugitives from Justice (Mar. 22, 1792), in 23 *The Papers of Thomas Jefferson* 328, 329 (C. Cullen ed. 1990). Jefferson also counseled against seeking the informal return of fugitive criminals from Spanish Florida, for fear we would be required to reciprocate. *See* Letter from Thomas Jefferson to George Washington (Nov. 7, 1791), in 22 *id.* at 266.

General Manuel Noriega and Luis Del Cid who were brought to the United States following their capture in the United States invasion of Panama. First, and crucially, the Government of the Republic of Panama has *not objected* in any form to the seizure and arrest of these two defendants, nor has it suggested there was any violation of Panamanian sovereignty. The United States has placed this fact on the record in the Miami prosecution pending against Noriega and Del Cid.[55] Secondly, the armed forces of the United States, acting pursuant to Presidential order, openly occupied the capital city and territory of Panama at the time Noriega and Del Cid were apprehended; ordinary treaty relations were thus arguably suspended.[56]

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55. "Noriega is not Panama's head of state. The Executive Branch recognizes another individual, Guillermo Endara, as Panama's President and head of state. . . . *The Endara Government is therefore the 'appropriate' entity to object* to treaty violations against the Republic of Panama, *and this it has not done.*" Government's Memorandum of Law in Response to Defendant Noriega's Motion to Dismiss Indictment, at 9-10 (emphasis added), United States v. Manuel Antonio Noriega, No. 88-0079 (S.D. Florida). "Panama has neither objected to Del Cid's seizure nor complained that its sovereignty was violated." Government's Memorandum of Law in Response to Defendant Del Cid's Request for an Evidentiary Hearing, at 8 n.4, United States v. Manuel Antonio Noriega, No. 88-0079 (S.D. Florida).

56. *See* Statement of Daniel Zafren, Specialist in American Public Law, Library of Congress, *Hearings on the Extradition Reform Act of 1981*, *supra* note 9, at 390, 391 ("a treaty may effectively be terminated or suspended . . . through the outbreak of hostilities between parties to the agreement"); *Lord McNair, The Law of Treaties* 716 (1961, reissued 1986) ("in the absence of contrary provisions, express or implied, an extradition treaty between two States which find themselves at war with another is at least suspended for the duration of the war . . . .").

In addition the President issued an order to United States troops invading Panama, directing them to apprehend Noriega as part of their military operation:

> In the course of carrying out the military operation in Panama which I have directed, I hereby direct and authorize the units and members of the Armed Forces of the United States to apprehend General Manuel Noriega and any other persons in Panama currently under indictment in the United States for drug-related offenses. I further direct that any persons apprehended pursuant to this directive are to be turned over to civil law enforcement officials of the United States as soon as practicable.

Memorandum for the Secretary of Defense from the President of the United States

This Court recognized in the 1989 Term that, where constitutional restrictions are inapplicable, the reciprocal understandings of treaty law are an appropriate means to protect citizens and aliens alike. As the Court noted in *United States v. Verdugo-Urquidez*, "If there are to be restrictions on searches and seizures which occur incident to . . . American action, they must be imposed by the political branches through diplomatic understanding, *treaty*, or legislation." 494 U.S. 259, 110 S.Ct. 1056, 1066 (1990) (emphasis added).

Here, the safeguards of the extradition treaty between Mexico and the United States were deliberately undertaken in 1980, with the advice and consent of the U.S. Senate and approval of the President, continuing a century-old treaty relationship. The Court of Appeals properly relied upon the standards of the 1980 treaty in concluding that the District Court could not exercise personal jurisdiction over a defendant abducted from Mexico by persons acting at the request of DEA agents in violation of the treaty.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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Lawyers Committee for Human Rights

March 1992

(Dec. 20, 1989), *reproduced in* Government's Memorandum in Opposition to Defendant Del Cid's Motion to Dismiss, at 3, United States v. Manuel Noriega, No. 88-0079 (S.D. Fla.).

No. 91-712

(18)

Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF RESPONDENT

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68 pp

QUESTION PRESENTED

Whether a person whom the government forcibly abducts from abroad, without any attempt to invoke the relevant extradition treaty, has a right to be repatriated when the state from which he was abducted demands his return.

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ON WRIT OF CERTIORARI TO THE
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BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The International Human Rights Law Group ("IHRLG") is a non-profit legal organization that promotes the observance of international human rights. Founded in 1978, the IHRLG

provides legal assistance and information on international human rights law and has Category II consultative status with the United Nations Economic and Social Council. In lawsuits raising questions of international human rights, the IHRLG provides legal advice with the assistance of private attorneys working on a pro bono basis. The IHRLG has obtained the written consent of the parties to file this brief.

SUMMARY OF ARGUMENT

Customary international law forbids one sovereign state from forcibly abducting a person from another sovereign state without the express or implied consent of that state. When the aggrieved state objects to the abduction and demands the return of the person, customary international law requires the

abducting state to return him. These principles are enforceable in the present case because customary international law is generally applicable in U.S. courts and these particular rules are not displaced by the Ker-Frisbie doctrine or otherwise. However, the Court need not reach these issues if it affirms the court of appeals' interpretation of the Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (the "1980 Extradition Treaty"). The IHRLG here expresses no view on that issue.

ARGUMENT

I. THE UNITED STATES VIOLATED CUSTOMARY INTERNATIONAL LAW BY FORCIBLY ABDUCTING ALVAREZ-MACHAIN FROM MEXICO

Throughout this litigation, the parties and lower courts have focused on

whether the forcible abduction from Mexico, at the behest of the United States Government, of a Mexican citizen charged with U.S. federal crimes, violates the 1980 Extradition Treaty and requires his repatriation. This focus has obscured the fact that customary international law, wholly apart from any rights and remedies that may exist under the 1980 Extradition Treaty, prohibits such a forcible abduction and, given the Mexican diplomatic protest, requires Alvarez to be repatriated.

The customary international law prohibition on forcible abduction flows from the rule that "States must not perform acts of sovereignty within the territory of another State." 1 L. Oppenheim, International Law § 144b (H. Lauterpacht, 8th ed. 1955). This rule, like all rules of customary international law, "results from a general

and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987) ("Restatement"). The rule is well-established in the main sources of evidence of customary international law: decisions of international and national tribunals and scholarly writings.[1/] As for U.S.

1/ E.g., S.S. "Lotus" (Turkey v. France), [1927] P.C.I.J. (ser. A.) No. 10 at 18, in 2 M. Hudson, World Court Reports 20, 35 (1935) ("the first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its powers in any form in the territory of another State"); F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law [hereinafter "Mann"], in International Law at a Time of Perplexity 407 (Y. Dinstein ed. 1989) ("[E]xercise of physical force by one State in the territory of another State without the latter's consent constitutes an excess of international jurisdiction or a violation of the 'principle of

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practice, the State Department has declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 Department of State Bulletin 251 (1948).

"Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent." Restatement § 432 comment b. Indeed, the Legal Adviser of the Department of State made precisely this point in testimony to Congress: "Forcible

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respect for State sovereignty'"); Restatement § 432 comment b ("It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent.").

abductions from a foreign State clearly violate this principle" requiring respect for sovereignty. FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 101st Cong., 1st Sess. 31 (1989) [hereinafter "House Oversight Hearing"] (prepared statement of Hon. Abraham Sofaer). Accord Mann at 407 ("A State which authorizes the abduction of a person from the territory of another sovereign state is guilty of a violation of public international law."); 1 H. Lauterpacht, International Law 488 (E. Lauterpacht ed. 1970).

There are, of course, many instances in which one state obtains custody of a person from abroad without violating the sovereignty of the rendering state. Most typically, this is done pursuant to an extradition treaty specifically

intended to permit one state to obtain persons from another state without sending agents there to conduct law enforcement activities in violation of international law. "[T]he principles of international law recognize no right to extradition apart from treaty." Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another." United States v. Rauscher, 119 U.S. 407, 411 (1886).

Aside from formal extradition proceedings, a state may obtain the consent or even cooperation of the foreign state to seize a person in its

territory. Where consent in advance is not obtained, the states may reach agreement after the fact to settle differences arising from the act of one seizing a person from the territory of the other. See generally House Oversight Hearing at 33-34 (statement of Hon. Abraham Sofaer describing varieties of express and implied consent).

Agreement after the fact is perhaps best illustrated by Israel's 1960 abduction of Adolph Eichmann from Argentina. There, Argentina filed a formal complaint with the United Nations Security Council, which adopted, with no votes against, a resolution condemning the abduction and requesting "the Government of Israel to make appropriate reparation."[2/] The resolution "merely

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2/ The resolution, U.N. Doc. S/4349 (1960), reprinted in House Oversight Hearing at 81, stated in relevant part:

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recognized a long standing principle of international law that abductions by one state of persons located within the

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> The Security Council,
>
> Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic,
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> Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations,
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> . . . .
>
> Noting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace,
>
> . . . .
>
> 2. Requests the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law. . . .

territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped." United States v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974). By the time of Eichmann's trial, however, the states had settled Argentina's claims at the diplomatic level, "resolv[ing] to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed fundamental rights of the State of Argentina." Attorney General v. Eichmann (Israel Dist. Ct. 1961) (quoting joint communiqué), reprinted in 36 Int'l L. Rep. 18, 59 (1968). "In these circumstances the accused cannot presume to speak, as it were, on behalf of Argentina and claim rights which that sovereign State had waived." Id. at 63, aff'd (Israel S. Ct. 1962), reprinted in

id. at 277, 305-06.

As discussed below at 39-44, all the U.S. caselaw on forcible abduction falls into some form of express or implied consent. None detracts in any way from the basic rule of customary international law that, in the absence of such consent, no state can forcibly abduct a person from another state, as the U.S. Government did here. See Pet. Br. at 2-4 (describing abduction).

II. THE REMEDY FOR A FORCIBLE ABDUCTION IN VIOLATION OF CUSTOMARY INTERNATIONAL LAW IS THE RETURN OF THE PERSON

When a state violates an international legal obligation to another state, the offending state must "terminate the violation and, ordinarily, . . . make reparation, including in appropriate circumstances restitution or compensation for loss or injury."

Restatement § 901. The remedy must "provide redress for the breach of the international obligation that gave rise to the claim. Ordinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking." Id. comment d.

The United States sought and obtained a judgment ordering restitution in the Iran hostages case before the International Court of Justice, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). There, the Court held the Iranian Government responsible for the seizure and detention in violation of the Vienna Conventions on Diplomatic and Consular Relations, a bilateral treaty, and customary international law. 1980 I.C.J. ¶90, at

42. Accordingly, the Court unanimously declared that the Iranian Government "must immediately take all steps to redress the situation," and in particular "must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must release each and every one and entrust them to [the United States Government]." Id. ¶95, at 45.

For cases of forcible abduction in violation of state sovereignty, this general rule of remedies requires, when the aggrieved state protests, the release and repatriation of the person seized. Thus, the Restatement provides:

> If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive

> reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws.

Restatement § 432 comment c (emphasis added). Similarly, Professor Mann states that "[t]he normal and generally accepted remedy in the event of a wrongful abduction is the return of the victim, i.e., restitution in kind." Mann at 411.

Of course, there are numerous cases in which courts have retained jurisdiction because local officials cooperated in the abduction,[3/] there was a

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3/ E.g., Ex parte Elliott, 1 All E.R. 373 (K.B. 1949) (arrest in Belgium by two British military officers accompanied by two Belgian police officers); The Savarkar Case (Feb. 24, 1911), reprinted in Hague Court Reports 275 (Scott ed. 1916)
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complete lack of protest,[4] or such protest as there was failed to meet domestic standards.[5]. Nevertheless, "[t]here are numerous cases in which the

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(arbitral panel holds France not to be entitled to the restitution of a British-Indian fugitive who had eluded British custody while on a ship docked in Marseilles and had been returned to British authorities by a French policeman).

4/ E.g., Afouneh v. Attorney-General, 10 Ann. Dig. 327 (Palestine S. Ct. 1942) (arrest in Syria by Palestine police); In re Károly, 4 Ann. Dig. 345 (Hungarian Minister of Justice 1928); R. v. Lopez and Sattler, 1 Dearsly & Bell's Crown Cases 525 (1858); Ex parte Scott, 9 Barn & C. 446 (1829) (arrest in Belgium by English police).

5/ E.g., 19 GGART 25 Verfahrenshindernis wegen Verletzung von Hoheitsrechten (German S. Ct.) reprinted in 1985 Neue Zeitschrift fur Strafrecht STZ 464 (arrest in the Netherlands by German police; note from the Dutch embassy did not meet the German Constitution's requirement that the foreign government formally object to the defendant's prosecution); Re Argoud, 1964 Bull. Crim. No. 420, 45 Int'l L. Rep. 90 (Cour de Cassation June 4, 1964) (forcible abduction from Germany; protest arrived late).

injured State has demanded, and the wrongdoing State has agreed, to the return of the victim. It is important to stress the unanimity of practice and doctrine on this point, for it has often been doubted whether international law recognizes the remedy of restitution in kind. . . . This view is clearly without foundation . . . ." Mann at 411.[6/]

6/ E.g., Jacob Case (1935), in Preuss, Settlement of the Jacob Kidnapping Case, 30 Am. J. Int'l L. 123 (1936) (Germany released a German seized in Switzerland, after Switzerland initiated arbitration under a Swiss-German treaty); In Re Jolis, 2 S. Jur. II 105 (1934), 7 Ann. Dig. 191 (Tribunal Correctionel d'Avesnes, France, July 22, 1933) (arrest in Belgium by French police; Belgian Government protested to the French Government and demanded the return of the individual); Matter of Nollet, Journal du Droit Int'l 1188 (Cour d'appel de Douai 1891) (arrest in Belgium by French police). See generally 1 M. Bassiouni, International Extradition: United States Law and Practice, ch. V, § 5.4, at 234-37 (2d rev. ed. 1987)
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"The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity." House Oversight Hearing at 32 (prepared statement of Hon. Abraham Sofaer). The Office of Legal Counsel ("OLC") in the U.S. Department of Justice endorsed it in a formal 1980 opinion to the Attorney General when asked about the legality of a proposed forcible abduction by the FBI. Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Couns. 543 (1980) (the "OLC Opinion"), reprinted in House Oversight Hearing at 75. The OLC concluded "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law. It is

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(collecting cases).

regarded as an impermissible invasion of the territorial integrity of another state." OLC Opinion at 549 (citing United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975)).

Although the Department of Justice later retracted the OLC Opinion and issued a new, unpublished one, it did so for reasons entirely unrelated to the recognition of the proscription, under customary international law, on forcibly abducting a person from another sovereign state over its protest. According to then-Assistant Attorney General William Barr and State Department Legal Adviser Sofaer, the OLC issued the new opinion to assert (1) the authority of Congress and the President, under U.S. law, to violate customary international law; (2) the authority of the FBI, under its enabling statutes, to

conduct forcible abductions without the express or implied consent of the foreign state; and (3) the authority of the United States, under international law, to undertake certain forcible abductions as a matter of self-defense. House Oversight Hearing at 2-21 (statement of William Barr); id. at 22-42 (statement of Hon. Abraham Sofaer).

In the present case, we do not understand the Government to justify the abduction of Alvarez-Machain under customary international law as a matter of national self-defense. "The evidence of imminent harm from [drug] traffickers' threats would have to be strong to sustain a self-defense argument." Id. at 24 (statement of Hon. Abraham Sofaer). "[T]here would have to be specific acts or dangers that amounted to an attack on the United States under

the U.N. Charter . . . ." Id. at 68 (same). And, as discussed below at 26-47, none of the bases under U.S. law to displace the customary international law proscription on forcible abduction applies here.

Moreover, whatever the minimum level of protest might be necessary to trigger this customary international law remedy of repatriation, it has surely been met in the present case. The diplomatic note dated May 16, 1990 from the Embassy of Mexico to the State Department plainly stated that the forcible abduction of Alvarez-Machain "violate[d] both the mexican Constitutional Law, as well as International Law" and demanded his return to Mexico to stand trial, if the facts warranted, under Mexican law. J.A. at 35-36. The Mexican Secretaria de Relaciones Exteriores Consulada General repeated these views

directly to the court of appeals in a letter dated November 9, 1990. Id. at 67-71. Based on these documents, the court of appeals correctly found "there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation." United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991). Compare United States v. Verdugo-Urquidez, 939 F.2d 1341, 1360 & n.22 (9th Cir. 1991) (finding sufficient protest on the record), petition for cert. pending, No. 91-670, with id. at 1364-69 (Browning, J., concurring but advocating remand to determine adequacy of protest).

III. THE CUSTOMARY INTERNATIONAL LAW PROHIBITION ON FORCIBLE ABDUCTION IS ENFORCEABLE IN U.S. COURTS

As shown above, customary international law forbids one state from

forcibly abducting a person from another state, without its express or implied consent; when that state protests, customary international law requires the abducting state to return him; and, thus, on the facts of this case, the United States is obligated to return Alvarez-Machain to Mexico. In this section, we discuss why Alvarez-Machain can invoke these rules in federal court.

A. The Prohibition Is Law of the United States, and Is Not Displaced by the Ker-Frisbie Doctrine or Otherwise

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). Unlike treaties, which may

require implementing legislation to become enforceable in U.S. courts, see Foster v. Neilson, 27 U.S. (2 Pet.) 253, 298 (1829), customary international law is self-executing. In other words, as a starting proposition, customary international law is enforceable in U.S. courts and, like federal common law, is supreme to state law. Restatement §§ 111(1), (3). See also, e.g., Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116-17 (Pa. 1784) (defendant held liable under customary international law for assault on French diplomat); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795) (international law creates a domestic cause of action in seizure of foreign vessel in international waters); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 451-53 & nn.14-15 (1964) (White, J., dissenting) (collecting cases).

This is not to say that customary international law is necessarily supreme to other sources of federal law applicable in U.S. courts. Customary international law "will not be given effect as law in the United States if it is inconsistent with the United States Constitution." Restatement § 115(3). And in regard to other sources of federal law, this Court explained in The Paquete Habana that international law applies if "there is no treaty, and no controlling executive or legislative act or judicial decision." 175 U.S. at 700. (Of course, any such act or decision must itself be consistent with the Constitution.) In the present case, the customary international law prohibition on forcible abduction is neither "inconsistent" with the Constitution nor displaced by any of the four potential

sources of federal law listed in The Paquete Habana.

1. The 1980 Extradition Treaty

Whether or not the 1980 Extradition Treaty prohibits forcible abduction, it certainly creates no right, expressly or by implication, to do it. See Air France v. Saks, 470 U.S. 392, 397 (1985); Restatement § 325(1) (a treaty is "to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). That being so, the treaty does not displace the general rule of customary international law prohibiting forcible abduction.

2. "Controlling . . . Legislative Act"

Likewise, Congress did not authorize the Drug Enforcement Administration ("DEA") or its agents forcibly to abduct

persons charged with the crimes for which Alvarez-Machain is indicted. Insofar as U.S. courts are concerned, Congress has the Constitutional power to authorize forcible abduction, and such legislation would be "controlling," under The Paquete Habana, to displace any conflicting rule of customary international law. See Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960); Restatement §115(1)(a). But "[w]hile Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice." House Oversight Hearing at 30 (statement of Hon. Abraham

Sofaer). "Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume [a statute] 'is primarily concerned with domestic conditions.'" Equal Employment Opportunity Commission v. Arabian American Oil Co., 111 S. Ct. 1227, 1230 (1991) ("EEOC") (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957), and Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).7/

7/ See, e.g., Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains"); Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984) ("To construe 7 U.S.C. § 15 as empowering the district court to enforce an investigative subpoena served on a foreign citizen in a foreign nation would seriously impinge on principles of international law."); Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980)
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At this juncture, it is important to distinguish between prescriptive jurisdiction (i.e., "the authority of a state to make its law applicable to persons or activities") and enforcement jurisdiction (i.e., "the authority of a state to use the resources of government to induce or compel compliance with its law"). Restatement Part IV Introductory Note. The criminal statutes under which Alvarez-Machain has been indicted are wholly prescriptive: committing violent acts in aid of racketeering (18 U.S.C. §

("Given the plain intrusion upon French national sovereignty resulting from the FTC's direct service of its compulsory process abroad and the violation of international law which would result if the district court were to enforce the subpoena here, the only issue is whether the provisions which governed subpoena service within the FTC Act at the time of the challenged service could have been sensibly construed so as to avoid conflict with international law.") (footnotes omitted); Restatement § 114.

1959) and conspiring to do so (18 U.S.C. § 371), kidnapping a federal agent and conspiring to do so (18 U.S.C. §§ 1201(c) and 1201(a)(5)), and murdering a federal agent (18 U.S.C. § 1111). These statutes do not, by themselves, authorize any extraterritorial enforcement measures such as forcible abduction.

The sole grant of enforcement jurisdiction to the DEA, 21 U.S.C. § 878(a), is silent as to extraterritorial application and thus, under EEOC, cannot be read to authorize forcible abduction in violation of customary international law. That statute provides:

> Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may--
>
> (1) carry firearms;
>
> (2) execute and serve search warrants, arrests warrants, administrative inspection warrants,

> subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;
>
> (4) make seizures of property pursuant to the provisions of this subchapter; and
>
> (5) perform such other law enforcement duties as the Attorney General may designate.

To the extent Congress has expressly addressed extraterritorial enforcement by the DEA, it has been to restrict such activity: "No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." 22 U.S.C. § 2291(c)(1). See Senate Foreign Relations Comm., Internal Security Assistance and Arms Export Control Act

of 1976: Report on S. 2662, S. Rep. No. 605, 94th Cong., 2d Sess. 54-55 (1976) (declaration of committee intent regarding 22 U.S.C. § 2291(c)(1)). When Congress intends to displace customary international law with respect to enforcement jurisdiction, it does so plainly. E.g., Section 3202(d) of the Maritime Drug Law Enforcement Prosecution Improvements Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-96, (codified as amended at 46 U.S.C. app. § 1903(d)) ("A claim of failure to comply with international law in the enforcement of this Act may be invoked by a foreign state, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act.").

3. "Controlling Executive . . . Act"

Nor has there been in this case any "controlling executive . . . act" in the sense required by The Paquete Habana, as the facts of that case make clear. There, this Court sat as a prize court with jurisdiction over two fishing boats captured during the Spanish-American War. With an extensive review of the evidence of international law, the Court concluded that "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." 175 U.S. at 686. "This rule of international law is one which prize courts, administering the law of

nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter." Id. at 708. On the facts, the relevant "public acts" were a Presidential Proclamation to institute a naval blockade "in pursuance of the laws of the United States, and the law of nations applicable to such cases," and an authorization from the Secretary of the Navy to the fleet admiral to seize vessels "attempting to violate blockade" and to detain "any such vessel or crew considered likely to aid enemy." Id. at 712-13. Since both vessels seized were coastal fishing vessels and neither attempted to violate the blockade nor was likely to aid the enemy, the Court enforced the customary international law of prize and held the Government liable for the seizures. Id. at 713-14. In

short, "the decision in [The Paquete Habana] found no controlling Executive Act, affirmed the relevance of international law to the conduct of Executive Branch officials, and disallowed an action by a lower official because it violated international law." House Oversight Hearing at 27 (prepared statement of Hon. Abraham Sofaer).

That the Court addressed the merits in The Paquete Habana rebuts any argument that the present case poses a nonjusticiable "political question." Cf. Pet. Br. at 38-41. All a court need determine in a forcible abduction case is (a) whether there was a violation of customary international law (i.e., the fact of the abduction, state responsibility for it, and adequate protest from the aggrieved state), and if there was (b) whether, in the circumstances of the case, that law is

displaced by any contrary treaty or "controlling executive or legislative act or judicial decision." 175 U.S. at 700. The fact that Congress and the President have the power to displace customary international law means that cases where neither of them have exercised that power present no separation of powers concerns, see Banco Nacional de Cuba, 376 U.S. at 427-37, or "political questions," see Baker v. Carr, 369 U.S. 186, 211-12, 217 (1962).

In the present case, the relevant "executive act" was the authorization by DEA Agent Hector Berrellez to Antonio Garate-Bustamante "to tell his associates that, in return for the delivery of respondent to the DEA's custody in the United States, the DEA would pay a $50,000 reward plus expenses." Pet. Br. at 3. This was not an act done at sufficient seniority in

the Executive Branch to displace customary international law. Cf. Garcia-Mir v. Meese, 788 F.2d 1446, 1454 (11th Cir.) ("there was such a controlling act in the Attorney General's termination of the status review plan [concerning a class of Cuban refugees] and in his decision to incarcerate indefinitely pending efforts to deport"), cert. denied, 479 U.S. 889 (1986); House Oversight Hearing at 68 (statement of Assistant Attorney General Barr that there would be "presidential consideration" of any proposed forcible abduction by the FBI without foreign state consent).

Moreoever, we do not understand the Government to argue that the Executive Branch in this case ever chose to disregard customary international law, but rather to argue that there was no violation. This justification fails to

meet the plain statement rule the courts have required of both Congress and the President to displace customary international law. The plain statement rule is particularly important to enforce against the Executive Branch, for "[u]nlike Congress, the President has no general authority to make law that might compete with international law as law of the United States." Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 Harv. L. Rev. 853, 879 (1987) (Presidential authority to displace customary international law might be grounded in the foreign affairs powers of Article II, but not in the Article II, § 3 directive to "take Care that the Laws be faithfully executed").

4. The Ker-Frisbie Doctrine

This leaves the fourth factor under The Paquete Habana, whether there is a "controlling . . . judicial decision" displacing customary international law. To be sure, this Court and various lower courts have held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" Frisbie v. Collins, 342 U.S. 519, 522 (1952). See also Ker v. Illinois, 119 U.S. 436, 444 (1886); The Merino, 22 U.S. (9 Wheat.) 391, 402-03 (1824) (ship seizure); The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102, 104 (1815) (ship seizure); Restatement § 433. However, none of the cases applying this Ker-Frisbie rule have involved the exact fact pattern

presented here: a forcible abduction, without the express or implied consent of the foreign state and indeed causing it to protest, at the behest of the U.S. Government. Frisbie, for instance, arose from an interstate abduction within the United States and thus presented no question of customary international law.[8/] In Ker, The

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8/ See also, e.g., New York v. Harris, 110 S. Ct. 1640, 1643 (1990); Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038-1039 (1984); United States v. Crews, 445 U.S. 463, 474 (1980); Stone v. Powell, 428 U.S. 465, 485 (1976); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Pettibone v. Nichols, 203 U.S. 192, 207-208 (1906); Lascelles v. Georgia, 148 U.S. 537, 543 (1893); Cook v. Hart, 146 U.S. 183, 192 (1892) (all applying Ker-Frisbie to domestic seizures). The Brief for Respondent discusses the decisions of this Court distinguishing seizures in the domestic and international contexts. See, e.g., Nevada v. Hall, 440 U.S. 410, 425 (1979) (Extradition Clause of Article IV "demonstrate[s] that ours is not a union of 50 wholly independent sovereigns").

Merino, and The Ship Richmond, there was no state protest and thus no obligation under customary international law for the United States to return the person and ships seized, respectively.[9/] In

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9/ See Ker v. People, 110 Ill. 627, 640 (1884) ("If the government of Peru does not complain of the arrest of defendant within its jurisdiction, as an infraction of international law, it does not lie in the mouth of defendant to make complain on its behalf."), aff'd, 119 U.S. 436 (1886). See also, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.) ("Without an official protest, we cannot conclude that Honduras has objected to Matta's arrest. Therefore Matta's claims of violations of international law do not entitle him to relief."), cert. denied, 111 S. Ct. 209 (1990); United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988) ("neither party to the treaty has objected"); United States v. Zabeneh, 837 F.2d 1249, 1261 (5th Cir. 1988) ("Because neither Guatemala nor Belize protested appellant's detention and removal to the United States, appellant lacks standing to raise the treaties as basis for challenging the court's jurisdiction"); United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) (neither "Panama [n]or

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addition, in Ker it is unclear at best whether the U.S. Government authorized the abduction. See 119 U.S. at 438, 442-43 (the abductor was only directed to receive Ker from Peruvian authorities in compliance with the extradition treaty). When there is no state responsibility, as when the abductors

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Venezuela objected to appellants' departure from their territories"); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("The Bahamian government has not sought his return or made any protest"); Waits v. McGowan, 516 F.2d 203, 208 & n.9 (3d Cir. 1975) ("The pleadings do not allege that Canada has objected in any way to the removal of Waits to this country"); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) ("the failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred"), cert. denied, 421 U.S. 1001 (1975); United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), aff'd sub nom. Unverzagt v. Benn, 5 F.2d 492 (9th Cir.), cert. denied, 269 U.S. 566 (1925) (no indication that Canada protested forcible abduction); State v. Brewster, 7 Vt. 118, 120-21 (1835) (same).

are private "bounty hunters" acting outside the scope of any actual state authority, the courts have retained jurisdiction.[10] Likewise several of the cases relying on Ker and Frisbie involved abductions occurring on the high seas, so there was no violation of foreign sovereignty.[11] Finally, a large number of cases were de facto

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10/ See, e.g., Kear v. Hilton, 699 F.2d 181, 184 (4th Cir. 1983) (abduction from Canada); Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (abduction from Mexico); Letter from Robert Bacon, Acting Secretary of State to the Mexican Charge (June 22, 1906), reprinted in H.R. Doc. No. 1, Part 2, 59th Cong., 2d Sess. 1121-22 (1909) (the Martinez incident).

11/ E.g., United States v. Yunis, 681 F. Supp. 891 (D.D.C. 1988), rev'd on other grounds, 859 F.2d 953 (D.C. Cir. 1989) (forcible abduction of Jordanian by U.S. military in international waters); United States v. Postal, 589 F.2d 862, 865 (5th Cir.), cert. denied, 444 U.S. 832 (1979) (search and seizure by Coast Guard of ship registered in the Grand Cayman Island, in international waters).

extraditions by officials of a foreign state, acting within the scope of their official duties.[12/]

12/ See, e.g., United States v. Kaufman, 858 F.2d 994, 1006 (5th Cir. 1988) ("The Franks brothers were arrested in Chetumal, Mexico, on July 24, 1986, by DEA agents and Mexican federal judicial police"); United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988) ("Verdugo-Urquidez's presence in the United States is the result of his arrest by Mexican police officers in Mexico and his delivery by them, across the border, into the waiting arms of the United States government."), rev'd on other grounds, 494 U.S. 259 (1990); United States v. Toro, 840 F.2d 1221, 1229 (5th Cir. 1988) ("The Panamanian authorities released the four men into Spasaro's custody at Howard Air Force Base on April 2, and Spasaro then placed the men on a DEA plane bound for Houston, where arrest warrants issued on March 2, 1986, were formally executed."); United States v. Matta-Ballesteros, 700 F. Supp. 528, 532 (N.D. Fla. 1988) ("Indeed, it appears that authorities of Honduras either seized and removed the defendant from their country or aided and acquiesced in his removal."); United States v. Evans, 667 F. Supp. 974, 979 (S.D.N.Y. 1987) (deportation by Bermuda authorities); United States v.

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Contrary to the Government's assertion, the application of the

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Rosenthal, 793 F.2d 1214, 1230 (11th Cir. 1986) ("Rosenthal was arrested on September 27, 1983, pursuant to an expulsion order issued by Colombian authorities."), cert. denied, 480 U.S. 919 (1987); United States v. Cordero, 668 F.2d 32, 35 (1st Cir. 1981) ("The Panamanians arrested the four and held them in jail. They were then sent by air to Venezuela, and then were sent on to Puerto Rico."); United States v. Fielding, 645 F.2d 719, 723-24 (9th Cir. 1981) (expulsion of American by Peruvian officials); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) ("Thailand initiated, aided and acquiesced in Valot's removal to the United States"); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976), ("Tricker took the defendants into custody for various infractions of Grand Cayman law and asked the defendants to board a plane bound for Miami after determining that the FBI was willing to pay the cost of defendants' airfare."), cert. denied, 429 U.S. 1038 (1977); United States v. Lovato, 520 F.2d 1270, 1272 (9th Cir.) (per curiam) (allegations that expulsion, apparently of an American, by Mexican Army personnel "amount[ed] to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien"), cert. denied, 423 U.S. 985 (1975); United States v. Cotten, 471

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customary international law prohibition on forcible abduction would not "immuniz[e] a defendant from all prosecution." Pet. Br. at 17. In the present case, were the court of appeals to be affirmed and Alvarez-Machain repatriated, the Mexican Government could extradite him to the United States either under the 1980 Extradition Treaty pursuant to a proper request, or outside the treaty if permitted under Mexican law. Alternatively, the Mexican government could prosecute him itself, which it is willing to do. See J.A. at 70-71.

F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973) (expulsion of Americans by Vietnamese officials); Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967) ("the appellants were deported by Mexican immigration authorities as undesirable aliens found in Mexico under suspicious circumstances"); United States v. Sobell, 244 F.2d 520, 524-25 (2d Cir.), cert. denied, 355 U.S. 873 (1957) (rendition from Mexico by Mexican police).

In either case, Alvarez-Machain would enjoy no "immunity" from prosecution. The sole question before this Court is whether to uphold the sovereign right of the Mexican Government to make that choice.

B. Alvarez-Machain Has Standing to Assert the U.S. Violation of Customary International Law as a Defense to Personal Jurisdiction

By being forcibly abducted from Mexico to face criminal charges in the United States, Alvarez-Machain clearly meets Article III requirements for standing: "'he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the [Government],' . . . the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United

for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

To be sure, the assertion of the customary international law proscription on forcible abduction raises the prudential concern that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 474. Neither policy animating that concern applies here. One is that "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). The Mexican Government clearly wishes to assert its right under

customary international law to have Alvarez-Machain repatriated. It most likely will not be able to enjoy this right if Alvarez-Machain is denied standing, for the extraordinary measures the DEA took to seize him imply that the agency has no intention to negotiate his release. See United States v. Caro-Quintero, 745 F. Supp. 599, 601-03 (C.D. Cal. 1990) (describing events leading up to the abduction).

The second policy is that "third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." Singleton, 428 U.S. at 114. This requires determining whether "the third party can reasonably be expected properly to frame the issues

and present them with the necessary adversarial zeal." Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984). In forcible abduction cases, this requirement should virtually never restrict standing because the sole issues to be framed, as Alvarez-Machain has done here, are the fact of the abduction, U.S. responsibility for it, and adequate protest from the aggrieved state. In addition, he is "the right's best available proponent," Singleton, 428 U.S. at 116, as it is difficult to see how the Mexican Government would be able to bring its own action in federal court to enforce its sovereign rights. See Restatement § 902 (interstate claims and remedies).

Contrary to the Government's assertion, Pet. Br. at 36-37, the fact that states typically have diplo-

matically settled disputes arising from forcible abduction does not mean Alvarez-Machain lacks standing. This is so because the Mexican diplomatic protest that establishes the international obligation of the United States to return Alvarez-Machain also satisfies the prudential concern for jus tertii standing in federal courts. Thus, as the Government notes, id. at 36, the Mexican Government could withdraw its protest -- either because it reached a diplomatic settlement or for any other or no reason -- and Alvarez-Machain would thereby lose his standing to assert the violation of Mexican sovereignty.

Third-party standing to raise customary international law as a defense to criminal prosecution is hardly new to U.S. jurisprudence. In particular, courts have long allowed diplomats

third-party standing to enforce diplomatic immunity, well before the adoption of express provisions to that effect in the Vienna Convention on Diplomatic Relations, T.I.A.S. 7502, 23 U.S.T. 3227 (entered into force in U.S. Dec. 13, 1972). See, e.g., Dupont v. Pichon, 4 U.S. (4 Dall.) 321 (1805) (allowing French chargé d'affaires to plead diplomatic immunity as defense to imprisonment in action on official debt); Restatement Ch. 6. Like the prohibition on forcible abduction, diplomatic immunities "are not the personal rights of the individual agent, but are conferred by international law on the sending state," which may waive them. Restatement § 464 comment j. See Davis v. Packard, 32 U.S. (7 Pet.) 276, 284 (1833); see generally United States v. Enger, 472 F. Supp. 490, 504-006 (D.N.J. 1978) (history of customary

international law of diplomatic immunity); 7 M. Whiteman, Digest of International Law § 43, at 421-36 (1970) (surveying state practice).

CONCLUSION

The forcible abduction of Alvarez-Machain from Mexico, at the behest of the U.S. Government and leading to a formal diplomatic protest from the Mexican Government, violated customary international law, which requires that he be returned. These principles of customary international law are U.S. law and are not displaced by the Ker-Frisbie doctrine or otherwise. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: March 5, 1992